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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 1046

METRO M. HOLOVACHKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

ROBERT J. DOWNING,
105 S. LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone Financial 6-3988

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 9

I.

The Trial Court's Unilateral Action In Changing Petit Jury Panels And Importing Jurors From Outside The Vicinage Of The Alleged Offense Amounted To A Compulsory Change Of Venue And Establishes Dangerous Precedents Violative Of The Constitutional Safeguards For A Fair And Impartial Trial 9

II.

The Constitutional Safeguards For A Fair And Impartial Trial Were Violated By The Prosecution When It Injected The Suggestion Of "Graft," "Rackets," And "Other Unrelated Crimes" Without Supporting Evidence In The Record 14

III.

The Opinion Of The Court Of Appeals Reduces To A Meaningless Shibboleth The Established Standards In Income Tax Evasion Cases On The

Net Worth-Expenditure Technique, Thereby Depriving Petitioner Of Due Process Of Law 16

A. Starting point not established 16

B. The Government's expert witness unconstitutionally invaded the province of the jury in preparing the Government's net worth summary 18

C. Current taxable income and likely source 20

D. Fraudulent intent was not established 22

IV.

The Petitioner's Constitutional Rights Were Violated When The Trial Court Gagged The Petitioner And Denied Him The Opportunity Of Presenting A Fair Rebuttal To The Government's 13th Juror 23

Conclusion 27

Appendix "A" — Opinion of the United States Court of Appeals for the Seventh Circuit 1a

Appendix "B" — Judgment of the United States Court of Appeals for the Seventh Circuit 33a

Appendix "C" — Constitutional Provisions and Statutes 35a

Citations

Cases:

Beck v. U. S., 9 Cir., 298 F. 2d 622 10
Blumenfield v. U. S., 8 Cir., 284 F. 2d 46 13
Bollenbach v. U. S., 326 U.S. 607 16
Continental Baking Company v. U. S., 6 Cir., 281 F. 2d 137 26
Delaney v. U. S., 1 Cir., 199 F. 2d 107 10
Dunn v. U. S., 5 Cir., 307 F. 2d 883 15
Ford v. U. S., 355 U.S. 38, reversed, remanded with directions to vacate judgment in 2 Cir., 237 F. 2d 57 ..... 14, 15, 22
Ford v. U. S., 5 Cir., 210 F. 2d 313 15
Fuller v. Comm., 6 Cir., 313 F. 2d 73 ..... 17, 18
Glasser v. U. S., 315 U.S. 60 13
Grayson v. Williams, 10 Cir., 256 F. 2d 61 18
Grubb v. Comm., 6 Cir., No. 14744, 4/9/63 (unreported) 17, 18
Gunn v. Comm., 8 Cir., 247 F. 2d 359 17
Heindel v. U. S., 6 Cir., 150 F. 2d 493 26
Holland v. U. S., 348 U.S. 121 ..... 18, 21
Kashat v. Comm., 6 Cir., 229 F. 2d 282 21
Kotteakos v. U. S., 328 U.S. 750 16
Phillips' Estate v. Comm., 5 Cir., 246 F. 2d 209 ..... 17, 18
Salinger v. Loisel, 265 U.S. 224 12
Schultz, David H., 30 TC 256 24
Smith v. U. S., 348 U.S. 147 23
Steele v. U. S., 5 Cir., 222 F. 2d 628 19
Thiel v. Southern Pacific Ry. Co., 328 U.S. 217 13
Thomas v. Comm., 1 Cir., 232 F. 2d 520 ..... 17, 18, 21
Thomas v. C.I.R., 6 Cir., 223 F. 2d 83 ..... 17, 18
U. S. v. Calderon, 348 U.S. 160 23
U. S. v. Johnson, 323 U.S. 273 12

U. S. v. Massei, 355 U.S. 595 21
U. S. v. Moran, 2 Cir., 194 F. 2d 623 13
U. S. v. Peach Mountain Coal Min. Co., et al, 2 Cir., 161 F. 2d 476 26
U. S. v. Ward, 3 Cir., 169 F. 2d 460 19
Watkins v. U. S., 1 Cir., 287 F. 2d 932 26

Constitution and Statutes:

The Fifth Amendment 22, 24, 35a
The Sixth Amendment 9, 12, 35a
26 U.S.C.A., Sec. 7201 ..... 4, 35a
28 U.S.C.A., Sec. 94 4
28 U.S.C.A., Sec. 1865(a) 9, 12, 35a
Federal Rules of Criminal Procedure:
Rule 18 ..... 9, 12, 36a
Rule 19 ..... 9, 12, 36a
Rule 21(a) 9, 12, 36a
General Information and Orders U. S. District Court Northern District of Indiana 5, 9, 37a

Miscellaneous:

Mertens, Law of Federal Taxation, Vol. 10, Sec. 55A, 27a at p. 127 21
Rothwacks, Meyer, Chief, Criminal Section, Dept. of Justice; "A Paper Submitted at a Symposium of the American Bar Association, Section of Taxation on Tax Fraud Procedures and Law" dated September 19, 1950 (not an official paper) 24
U. S. Bureau of Census, Dept. of Commerce 11
Wigmore (3rd Ed.), Vol. I, Sec. 34, p. 423 and Vol. II, Sec. 239, p. 37 26
Wharton's Criminal Evidence, (12th Ed.) Vol. I, Sec. 21, p. 431 26

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petitioner, Metro M. Holovachka, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 18, 1963.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals, attached hereto as Appendix "A" infra p. 1a is reported in 314 F. 2d 345.

JURISDICTION

The judgment of the Court of Appeals was entered February 18, 1963. (Appendix "B" infra p. 33a) Petitions for rehearing were denied March 28, 1963. The jurisdiction of this Court is invoked under *28 U.S.C. Section 1254(1).*

QUESTIONS PRESENTED

(1) Whether the trial court's unilateral action in changing the petit jury panels and compelling petitioner to be tried by an out-of-division jury amounted to a compulsory change of venue, or otherwise resulted in a violation of petitioner's constitutional right to a fair and impartial trial.

(2) Whether the requirements of due process of law were violated in an income tax evasion case by permitting: (a) the respondent to accuse the petitioner, a former Lake County (Indiana) prosecuting attorney, of receiving money from "Graft" when in fact no evidence of graft was in the record, and (b) numerous other prejudicial errors which occurred throughout the trial?

(3) Whether the safeguards and standards established by this Court in income tax evasion cases on the net worth-expenditure theory, e.g., in *Holland* v. *United States*, 348 U.S. 121 and related cases, were satisfied, particularly (but without limitation) as to starting point, burden of proof, current taxable income, likely source, corroboration?

(4) Whether the trial court's action in preventing petitioner from presenting his own theory of defense violated petitioner's constitutional right of due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

	Appendix "A" hereto
The Fifth Amendment	page 35a
The Sixth Amendment	page 35a
26 U.S.C.A., Sec. 7201	page 35a
28 U.S.C.A., Sec. 1865(a)	page 35a
Federal Rules of Criminal Procedure:	
Rule 18	page 36a
Rule 19	page 36a
Rule 21(a)	page 36a
General Information and Orders, U. S. District Court Northern District of Indiana	page 37a

STATEMENT OF THE CASE

The petitioner was indicted on three counts charging income tax evasion (*26 U.S.C.A., Sec. 72*, see infra App. "C" p. 35a) for the years of 1955, 1956 and 1957. The government, at the trial, relied on the so-called "net worth-expenditure" technique to establish its proof. The jury found the petitioner guilty as charged. The indictment alleged petitioner had reported an income tax liability of $11,893.81 for 1955, $10,486.75 for 1956 and $16,850.87 for 1957, whereas his correct tax liability for those years was $22,151.54, $31,523.91 and $24,893.48 respectively. The district court imposed concurrent sentences for three years on each of the three counts and a $10,000 fine on one count.

The indictment[1] was returned and trial held in the United States District Court for the Northern District of Indiana, in Hammond, Indiana. The Northern District of Indiana is divided (*28 U.S.C., Sec. 94*) into the Fort Wayne,

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[1] The instant indictment was returned January 12, 1962. Identical indictments had been returned on May 12, 1961, and September 28, 1961, the former for 1955 and 1956, the latter for 1957. Trial on the 1961 indictments commenced on November 13, 1961. Petitioner moved to quash the petit jury list on the basis that said jury was not properly drawn pursuant to *28 U.S.C., Sections 1861-1869*. After 29 jurors were examined (only 2 excused for cause) it was obvious the jurors were obtained only from "P.T.A." lists. The government thereupon joined in said motion and the jury was dismissed. Upon re-indictment by a new grand jury, the 1961 indictments were dismissed.

South Bend and Hammond Divisions. The district court has provided in its "*General Information and Order*" (see App. "C" p. 31a *infra*) that causes of action in the Hammond Division arising in the counties of Lake and Porter shall be filed at Hammond, whereas causes of action arising in the remaining 7 counties of the Hammond Division shall be filed at Lafayette. Court is held in Hammond or Lafayette depending on the origin of the case.

Petitioner was born in Gary, Lake County, Indiana, of immigrant parents from Czechoslovakia. Except for a few years while attending school, petitioner lived all of his 54 years in Gary. He practiced law and was active in politics as a Democrat in Gary and Lake County. During the indictment years he served (elected) as Prosecuting Attorney of Lake County. As prosecuting attorney he was not prohibited from practicing law nor did he represent the county in civil matters.

On January 2, 1962, a petit jury list of 75 persons, residents of Lake and Porter (adjoining) Counties, was drawn for the instant trial. On January 12, 1962, the trial court *suggested* a change of venue to Lafayette, about 100 miles from Hammond. This suggestion was objected to by petitioner who refused to consent to a change of venue.

On January 17, 1962, over petitioner's objection, the trial court on its own motion struck the entire Lake and Porter County panel of January 2. Thereupon petit jurors were drawn from the South Bend Division and Lafayette area of the Hammond Division, specifically excluding jurors from Lake and Porter Counties. Over objection, petitioner was tried by said jury summoned from outside

the vicinity or locality of the alleged offense. The petit jury was sequestered during the trial.

The government's case is based on its summary on the net worth-expenditure technique. Its expert witness admitted that the only evidence in the record of income not reported by the petitioner on the 1955-56-57 tax returns was the amount the expert computed on his "net worth" summary for those years (Gov. Ex. 186, App. 830).

The government used December 31, 1951 as its starting point. According to the government's summary, petitioner's taxable income not reported for 1955 was $18,718.06; 1956 was $22,329.43; 1957 was $15,885.07.

Government's Exhibit 186 "The Government's Summary of the Net Worth and Expenditures" was prepared by Special Agent Boyll. In preparing said exhibit he admitted that he had to pass upon and decide certain evidentiary issues in dispute both in and outside the record, in determining whether certain items and or amounts should or should not be included on Government's Exhibit 186. Petitioner's objection to said exhibit was denied by the trial court and completely disregarded in the opinion of the Court of Appeals. The disputed items involved amounts applicable to the starting point, as well as the specific years.

Petitioner attempted to introduce a net worth-expenditure summary (Def. Ex. 22). It was based on his theory of the evidence as to the proper treatment in the summary of $168,341 representing a tax-free return of petitioner's investment in special assessment bonds known as Barrett Bonds. Petitioner's theory was that this amount was current nontaxable income and as such was a deductive adjustment in the summary. This defense was

rejected by the trial court. The petitioner was compelled to introduce a net worth-expenditures summary based on the government and trial court's theory as to the crucial issue of the proper method of listing on said summaries the tax free return of investment from the Barrett Bonds. This dispute vitally affects the question of whether or not the government's summary is accurate.

The government established that petitioner received during the years 1953-1957 the amount of $168,341 as a tax free return on his investment in the Barrett Bonds.(c)

The government's summary listed as an asset as of December 31 for each year from 1952 through 1957 the net balance of petitioner's Barrett Bond investment (i.e. money invested minus money returned for each year).

Petitioner dealt in currency to a great extent. He explained this was a habit of his people and a practice taught him by his parents. The government illustrated that petitioner had currency transactions between 1952 through 1957 in the amount of $342,919. However, on the government's net worth summary he was not credited with one cent of cash on hand, either at the starting point or at any other year-end during that period.

The government did not offer any evidence of likely source; did not offer any evidence that its net worth increases were attributable to current taxable income; did

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(c) Barrett Bonds were issued by the City of Gary in connection with certain local improvements performed within the city, such as streets, curbs, gutters and sewers. Although there was a difference of opinion at the trial between the Treasury and Justice Departments, it is agreed that in the instant trial the return of principal is tax-free.

not offer any affirmative proof of falsity of petitioner's income tax returns; and did not offer any evidence to corroborate the alleged net worth bulge as computed on its summary.

On cross examination of the petitioner, the prosecution asked if petitioner received any money in "graft" payments (App. 1133). The court admonished the jury to disregard the question but denied petitioner's motion for mistrial.

Other trial incidents were claimed by the petitioner to have deprived him of a fair trial.

The trial consumed 19 days, 49 witnesses, 177 exhibits (including two net worth statements, 9 tax returns of the defendant and a stipulation of 46 pages), approximately 2700 reported pages of testimony, and instructions reported on 38 pages. The sequestered jury deliberated only 4 hours 15 minutes.

The Court of Appeals affirmed the petitioner's conviction. The petitioner is presently free on bail. The mandate of the Court of Appeals has been stayed pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S UNILATERAL ACTION IN CHANGING PETIT JURY PANELS AND IMPORTING JURORS FROM OUTSIDE THE VICINAGE OF THE ALLEGED OFFENSE AMOUNTED TO A COMPULSORY CHANGE OF VENUE AND ESTABLISHES DANGEROUS PRECEDENTS VIOLATIVE OF THE CONSTITUTIONAL SAFEGUARDS FOR A FAIR AND IMPARTIAL TRIAL.

The court below departed from the accepted and usual course of judicial proceedings by holding 28 *U.S.C.A. 1865(a)* (App. "C" infra p. 35a) can be employed to take away the right to a trial by an impartial jury guaranteed by the *6th Amendment* to the United States Constitution and the rights of a defendant in a criminal trial under *Rules 18, 19 and 21(a), Federal Rules of Criminal Procedure* (App. "C" infra p. 36a).

Petitioner, a life-long resident of Lake County, Indiana, was tried and convicted by a jury imported from the South Bend Division and that portion of the Hammond Division outside of Lake and Porter Counties. By a *unilateral ad hoc* order of the trial court, a panel of petit jurors drawn from Lake and Porter Counties was stricken 12 days before the trial was to commence. No objections had been made to the jurors from Lake and Porter Counties. The only applicable local district court rule is one of the *"General Information and Orders"* (App. "C" infra p. 37a) which states that causes of action arising in the counties of Lake and Porter shall be filed in Hammond. The rule intends that if the action is filed in Hammond,

it shall be tried in Hammond by a jury from Lake and Porter Counties. The district court in its announced reason, failed to support its action by any statute, decision, local rule, custom or practice. The Court of Appeal cites only the trial court as its authority.

The trial court justified its action on the alleged theory that because petitioner in 1961 objected to 1958-1959 newspaper stories, therefore petitioner was unable to obtain in 1962 fair and impartial jurors from Lake and Porter Counties. The Court of Appeals opinion concluded that petitioner's reference to 1958 and 1959 publicity justified the trial court's action, even though in *Beck* v. *U. S.*, 9 Cir., 298 F. 2nd 622 and *Delaney* v. *U. S.*, 1 Cir., 199 F. 2d 107 at 112, it was held that the prejudicial effect of publicity is not a continuing thing. Petitioner also objected on November 13, 1961 and January 29, 1962, to news stories obviously planted by government representatives.

Nowhere in the long record did petitioner at any time directly or indirectly suggest to the district court that fair and impartial jurors, legally selected, could not be obtained from Lake and Porter Counties. In fact petitioner maintained he could not receive a fair trial if jurors from Lake and Porter Counties were excluded. The record contains no showing that any of the January 2 panel harbored any prejudice against the petitioner or were in any way biased against him. The trial court's reasons are a strained, incorrect twisting of petitioner's motions. The action establishes a *subjective* test to be applied by trial courts resulting in an emasculation of the historic rights of a defendant to have something to say about the selection of the jurors.

On January 12, 1962, prior to striking the January 2, 1962, petit jury panel, the trial court attempted to persuade the petitioner to accept a change of venue to Lafayette. The petitioner objected to any change of venue.

The State of Indiana is divided into two distinctly, totally different areas. One is the Calumet Region (Lake and Porter Counties) the other, the balance of the state. Lake County is highly industrialized, has a large percentage of immigrants, and for years has been politically Democratic. Its 1960 population (per U. S. Bureau of Census, Department of Commerce) is 513,269. Porter County is 60,270. Their combined population represents approximately 41% of the entire South Bend and Hammond Divisions.

Another significant Bureau of Census statistic is that in 1960 in Lake County 11,569 residents were born in Czechoslovakia (birth place of defendant's parents) whereas in St. Joseph County (which comprises about 35% of the population of the South Bend Division) only 571 were born in said country.

The customs of immigrant parents, their practices with respect to handling cash, residents with knowledge of the habits and practices of the citizens of Gary, all vital issues in the trial, could be understood and appreciated only by the people from the Calumet Region, especially Lake County.

The grand jury which returned the instant indictment on January 12, 1962, contained residents from Lake and Porter Counties. After the trial court concluded that fair and impartial petit jurors could not be obtained from Lake and Porter Counties, he denied petitioner's motion to dismiss the indictment, holding, in effect, that grand

jurors from Lake and Porter Counties were not biased. This inconsistency in reasoning was approved by the Court of Appeals.

Rules 18, 19 and 21(a), Federal Rules of Criminal Procedure, clearly require the consent of a defendant for a change of venue from the division in which the alleged offense was committed. These rules are additional safeguards for securing a fair and impartial jury. As Mr. Justice Frankfurter said in *United States* v. *Johnson*, 323 U.S. 273 at 276, "Questions of venue in criminal cases are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."

The Court of Appeals has sanctioned a practice amounting to a compulsory change of venue. There is no *real* difference between being compelled to try a case in Lafayette before jurors from Lafayette and being compelled to try a case at Hammond before jurors from Lafayette and South Bend. To do either without the consent of a defendant violates the said *Rules 18, 19 and 21(a)*. The court's action is in conflict with *Salinger* v. *Loisel*, 265 U.S. 224.

28 U.S.C. Section 1865(a) was not intended by Congress in any way to abrogate the aforesaid venue privileges of a defendant. Yet the Court of Appeals' interpretation conflicts with the rights of a defendant protected by the *6th Amendment* to enjoy a trial by an impartial jury. Otherwise, *28 U.S.C.A. 1865(a)* is unconstitutional in that it violates rights protected by the *6th Amendment*.

The effect of the action below is to provide a jury that is not a cross-section and is not representative of a defendant's community. This action is in direct conflict with the

principles set forth by this Court in *Glasser* v. *U. S.*, 315 U.S. 60, 86; *Thiel* v. *Southern Pacific Ry. Co.*, 328 U.S. 217.

To appreciate the potential of the instant opinion one need only consider two simple hypotheticals. A prominent Cook County (Illinois) politician, possibly with the status of Chicago's Mayor, on trial in the Northern District of Illinois, Eastern Division, and the trial judge reaches beyond Democratic Cook County into the traditionally Republican and anti-Cook County counties of the Western Division of the Northern District of Illinois. Or a prominent Negro in Lake County, Indiana, where negroes constitute approximately 15.5% of the total population of Lake and Porter Counties can now be tried by jurors imported from the Lafayette portion of the Hammond Division where negroes constitute only 00.31% of the total population. The announced reasons for said action could be the same specious, *subjective* basis as in the instant case. A sophisticated, political minded jurist need only point to the opinion below to accomplish his result, to satisfy a temptation, and abuse criminal justice.

The court's action of striking the jury panel without either a motion of the petitioner or a *voire dire* examination on the alleged theory of protecting the petitioner's constitutional rights is specious and ludicrous. This *unilateral* action based on the alleged desire to protect petitioner from adverse newspaper publicity, conflicts with the requirements for establishing the effect of adverse publicity in selecting a petit jury, see *U. S.* v. *Moran*, 2 Cir., 194 F. 2d 623, 625; *Blumenfield* v. *U. S.*, 8 Cir. 284 F. 2d 46, 50, 51. If there was any valid basis for dismissing the petit jury, the court should have also dismissed the grand jury indictment.

To sequester an imported jury in an income tax case violated the petitioner's constitutional rights to a fair and impartial jury. The petitioner was given no opportunity to determine in the voire dire examination the possible effect of said action. The effect of this surprising and unjustified action on the jury can never be honestly determined. On the other hand, the jury on the 23rd day of being locked up concluded its jury deliberation at 12:45 A.M. after only 4 hours and 15 minutes deliberation. Who can honestly say that this speedy conclusion to a lengthy and complicated trial was not the jury's stampede to unshackle itself from this involuntary incarcerafion?

II.

THE CONSTITUTIONAL SAFEGUARDS FOR A FAIR AND IMPARTIAL TRIAL WERE VIOLATED BY THE PROSECUTION WHEN IT INJECTED THE SUGGESTION OF "GRAFT," "RACKETS," AND "OTHER UNRELATED CRIMES" WITHOUT SUPPORTING EVIDENCE IN THE RECORD.

On cross examination, the prosecutor asked (App. 1133) if in 1955, 1956 and 1957 the petitioner received any money in *graft* payments. The prosecutor admitted that there was no evidence in the record to indicate the receipt of "graft" or to show where the net worth "bulges" came from. The use of the word "graft" was a knowing and deliberate attempt to prejudice the jury. The trial court denied petitioner's motion for mistrial but admonished the jury to disregard the question.

Another purpose of the "graft" question was to suggest a "likely source." In the courts below the government spent considerable time in justifying the question, relying primarily on *Ford v. U. S.*, 2 Cir. 237 F. 2d 57. The Court

of Appeals' opinion completely ignored the poisonous "graft" question, its purpose and damning effect.

The basis for the "graft" question had no support in the record even faintly comparable to the use of "graft" in *Ford* v. *U. S.*, 355 U.S. 38 wherein this court vacated the judgment of conviction (2 Cir., 237 F. 2d 57) with directions to dismiss the indictment. It also conflicts with *Ford* v. *U. S.*, 5 Cir., 210 F. 2d 313; *Dunn* v. *U. S.*, 5 Cir., 307 F. 2d 883.

Prosecutors need have no fear in the future (except to have the question stricken) when they suggest by question that a defendant obtained money from graft, vice, murder or by pushing heroin to teen-agers. The case below can be used by prosecutors as authority on this tremendously important principle.

The second government witness referred to the Senate (U. S.) Labor-Management (McClellan) Committee as the "*Rackets*" committee. The trial court failed to advise the jury to disregard the improper testimony. Thereafter the government during the trial frequently made reference to the committee under its proper name. The only purpose of all this action was to produce a constant dose of prejudice to the jury, not to establish the essential elements of the crime charged.

During the cross examination of the petitioner, the prosecutor suggested through questions that he committed three alleged violations of Indiana law. The fact that the government failed to legally establish these allegations or to establish their materiality and relevancy to the crime of income tax evasion was inconsequential to the Court of Appeals. The government did not believe they were inconsequential. The experienced prosecutor asked the

question for only one purpose, to prejudice the minds of the jurors.

The foregoing are the principal illustrations of some of the prejudicial acts which, taken together as a whole, violated the constitutional rights of a defendant to a fair and impartial trial. Each act cannot be treated in a vacuum.

The action of the instant case sanctioned by the Court of Appeals conflicts with the standards of this Court set forth in *Kotteakos* v. *U. S.*, 328 U.S. 750; *Bollenbach* v. *U. S.*, 326 U.S. 607.

III.

THE OPINION OF THE COURT OF APPEALS REDUCES TO A MEANINGLESS SHIBBOLETH THE ESTABLISHED STANDARDS IN INCOME TAX EVASION CASES ON THE NET WORTH-EXPENDITURE TECHNIQUE, THEREBY DEPRIVING PETITIONER OF DUE PROCESS OF LAW.

A. Starting Point Not Established.

The government's net worth starting point was December 31, 1951. Its computation of petitioner's net worth was then $70,321.43. The government's evidence also indicated that in the late 1940's petitioner had a net worth of between 68 to 78 thousand dollars.

Two disputed items affecting the government's starting point were handled in error by the government. These are:

1. *Cash on hand.* The government's summary did not include at the starting point, or for any year, one cent of cash on hand. The government claimed (a) for the period 1952 through 1957 that petitioner had currency transactions of $342,919; (b) that petitioner had no cash-on-hand on December 31, 1951; and (c) that in 1952 he handled $64,352 in cash (Gov. Ex. 187). Special Agent

Boyll, the government's expert witness, stated no cash-on hand was included because petitioner could not specifically recall (for as long as 8 years) the amount on hand on specific dates. This arbitrary action squarely conflicts with *Thomas* v. *C.I.R.*, 6 Cir., 223 F. 2d 83, 89-90; *Thomas* v. *Comm.*, 1 Cir., 232 F. 2d 520, 524-526; *Gunn* v. *Comm.*, 8 Cir., 247 F. 2d 359, 362-365; *Fuller* v. *Comm.*, 6 Cir., 313 F. 2d 73-77; *Phillips' Estate* v. *Comm.*, 5 Cir., 246 F. 2d 209, 213, 214; *Grubb* v. *Comm.*, 6 Cir., 4/9/63 No. 14744 (unreported), all of which hold such an arbitrary "guess" by the government as to cash-on-hand is not justified.

It is submitted that the government's facts do violence to its expert's conclusion there was no cash on hand. It must also be remembered that the government's summary was presented at the conclusion of its case and must be (especially in this case) an integral part of its burden of proof.

The government's error in omitting cash on hand from the starting point and for all years was actually motivated by the lack of a case. Cash on hand at the start would have materially weakened its case.

2. *The Lovelace Matter.* The government offered one witness and six exhibits concerning certain improved real estate to establish an asset of petitioner. A tentative net worth statement prepared by a revenue agent listed this property as petitioner's asset in 1951 and 1952.

Boyll testified that he did not include this property as petitioner's asset in the government's net worth summary because it was his *opinion* that this was not an asset of petitioner in 1951 and 1952, notwithstanding all of the government's evidence. The record established the value of this asset as of 12/31/51 (starting point) was $11,121.71.

This is another illustration of the government's failure to include known items in evidence in the starting point. The reason is obvious. To do so would increase the net worth at the starting point and automatically reduce or eliminate the so-called unreported taxable income.

The government's opening net worth was clearly inaccurate. Thus it directly conflicts with the requirements set by this Court that the opening net worth must be established by competent evidence with reasonable certainty. *Holland* v. *U. S.*, 348 U.S. 121, 132. See also *Fuller* v. *Comm.*, 6 Cir., 313 F. 2d 73, 77; *Thomas* v. *C.I.R.*, 6 Cir., 223 F. 2d 83, 89; *Thomas* v. *C.I.R.*, 1 Cir., 232 F. 2d 520, 524-526; *Phillips Estate* v. *C.I.R.*, 5 Cir., 246 F. 2d 209, 213, 214; *Grubb* v. *Comm.*, 6 Cir., 4/9/63 No. 14744 (unreported).

B. The Government's Expert Witness Unconstitutionally Invaded the Province of the Jury in Preparing the Government's Net Worth Summary.

The burden of proof in criminal income tax evasion cases is still on the government, according to the *Holland* case, p. 138.

In discharging its burden in circumstantial evidence cases such as the net worth-expenditure technique the government uses an "expert" witness to summarize the evidence. This practice is permitted in these complicated cases on the belief that laymen jurors cannot intelligently summarize the evidence. See *Grayson* v. *Williams*, 10 Cir., 256 F. 2d 61, 63.

In the instant case, Special Agent Boyll was the government's expert. He prepared the net worth summary. In *nine* instances, Boyll acted as the "13th juror" while also testifying as an "*expert.*" Three of the *nine* instances in

summary are: (1) cash on hand; (2) Lovelace matter (see pp. 16, 17 herein); and (3) Barrett Bonds (see pp. 23-27 herein).

In each of the other six items of the government's evidence, Boyll obviously did not *believe* the evidence. The government's net worth summary as to these nine items was computed on the basis of Boyll's decision of these evidentiary issues. Boyll presented to the jury his opinion as to the ultimate fact to be decided by the jury—namely, that all the fact disputes which he resolved, and all the elementary issues, when evaluated as shown on his summary, establish unreported taxable income. The full impact of this conclusion by the so-called expert in the final stages of trial was left to settle like a shroud of guilt over the petitioner.

Petitioner's motion to strike government's summary on the basis that it was Boyll's *assumption, evaluation* and *conclusion* of disputed evidence was denied. As each disputed item was an integral part of the government's computation, Boyll had to act as a "13th juror" in order to decide these crucial evidentiary problems in favor of the government. The government could not risk permitting the jury to decide, one by one, each crucial item and then compute the final result. In approving Boyll's conduct, the court's opinion is in conflict with the acceptable conduct of an "expert" as announced in *U. S.* v. *Ward*, 3 Cir., 169 F. 2d 460, 462, 463; *Steele* v. *U. S.*, 5 Cir., 222 F. 2d 628-631.

Each of the nine crucial evidentiary questions was solely for the jury. Yet, by Boyll deciding how to treat them on the net worth summary, each question loses its identity and becomes buried in the final result of the government's

summary. It is naive to believe that any jury—in four hours—could consider and evaluate each evidentiary issue, then adjust the end result (up or down on a summary) by their own decision. Thus the invasion of the jury's function becomes complete merely by virtue of the nature of the complicated net worth summary cases.

C. Current Taxable Income and Likely Source.

There was no direct evidence of willfully unreported, current taxable income or of a likely source for 1955, 1956 and 1957. In the *Holland* case (p. 137) this Court held that in net worth cases, there must be evidence supporting the inference that the net worth increases are attributable to currently taxable income.

This Court recognized that the net worth theory of prosecution based on circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation, *Holland* case at p. 129.

The government's theory in the trial court (App. 100) was to plant in the minds of the jury that petitioner's unreported income stemmed from "graft." Of course, there was no such evidence, of any variety, in the record. Therefore the government planted the prejudicial "graft" and "rackets" references at the start and finish of the trial to provide a "likely source." Before the Court of Appeals the government suggested that the "bulge" in its net worth summary could be inferred from "graft"; therefore "graft" was the unreported *current taxable income* and *likely source*.

The Court of Appeals avoided the "graft" theory and adopted a new concept "*some taxable source* of income" (emphasis supplied) (Opinion App. "A" infra, p. 26a).

Then obviously recognizing the novelty of its assertion, the Court of Appeals discovered that the source was petitioner's unreported professional income. The government, of course, never advanced that theory because its theory was that petitioner was too busy as a "Prosecuting Attorney" and, anyhow, never had any practice of law. Thus at the trial the government conceded that the alleged unreported income did *not* come from the same source as produced the petitioner's reported income.

Neither the prosecutor nor the Court of Appeals ever identified a "source" as "current taxable income" which was *unreported*.

In *Holland* case at pp. 137, 138, this court said:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to *currently taxable income*. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang is sufficient." (Emphasis supplied)

The aforesaid language fits precisely the instant facts. The government's case is based on a net worth summary, computed by an expert who acted as a "13th juror" to establish a "bulge" which the government hopes will be *assumed* to be *currently taxable income*. This theory conflicts with *Thomas* v. *Comm.*, 1 Cir., 232 F. 2d 520, 526; *Kashat* v. *Comm.*, 6 Cir., 229 F. 2d 282, 285. Also see *Mertens*, Law of Federal Income Taxation, Vol. 10, Sec. 55A. 27a at p. 127.

It is recognized that in *U. S.* v. *Massei*, 355 U.S. 595 (affirming 1 Cir., 241 F. 2d 895) in affirming the reversal of a lower court for prejudicial conduct similar to the instant case, this Court did say that proof of likely source was not necessary in every case. This was so, should *all*

possible sources of non-taxable income be negatived. In the instant case, notwithstanding the assertion of the Court of Appeals, the record will show with abundant clarity that the government or trial court disregarded and arbitrarily rejected the evidence. It did not negative all possible sources.

In *Ford* v. *U. S.*, 355 U.S. 38, this court remanded with directions to vacate a judgment of conviction and dismiss the indictment (2 Cir., 237 F. 2d 57). This *Ford* case involved the same "graft" theory and no likely source as in the instant case.

Certainly where there is no direct evidence of any unreported current taxable income, certainly where there is no evidence of likely source, the *Massei* opinion cannot be interpreted to further reduce the burden of proof rightfully imposed on the government in this type of cases.

The foregoing emphatically illustrates the hazards of defending a net worth prosecution. This court has recognized that net worth prosecution cases are fraught with danger. The standards thought to have been established in net worth cases have not served to safeguard a defendant's rights guaranteed by the *5th Amendment*.

D. Fraudulent Intent Was Not Established.

The government admitted that the only evidence of unreported income was the amount computed on its net worth summary (Gov. Ex. 186) (App. 830). Deductions claimed by petitioner on his returns were not disputed. Petitioner had no concealed bank accounts and reported all interest and dividends received during the taxable years.

There is no direct evidence of any act tending to establish fraudulent intent of tax evasion for the indictment

years. Likewise, there is no direct evidence that petitioner omitted one cent of reportable income during the indictment years.

The Court of Appeals stated (Opinion App. "A" infra p. 26a) *in error* defendant conceded an underreporting of income of $6,106.09 for the year 1956. This is another glaring illustration of a lack of understanding of the net worth summary technique.

The government's case is based on uncorroborated inferences of incredibility. The court's opinion admits that the government's case is based solely on inferences. Its case is based entirely on its own net worth summary. There is no corroborated independent evidence to establish intent to evade taxes. It therefore violates the warning of this court in the *Holland* case at p. 128:

> "* * * bare figures have a way of acquiring an existence of their own, independent of the evidence which gives rise to them."

In *Smith* v. *U. S.*, 348 U.S. 147 and *U. S.* v. *Calderon*, 348 U.S. 160 this court held affirmative admissions of tax evasion must be corroborated to support a conviction. There is no affirmative evidence of tax evasion in the instant case.

IV.

THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT GAGGED THE PETITIONER AND DENIED HIM THE OPPORTUNITY OF PRESENTING A FAIR REBUTTAL TO THE GOVERNMENT'S 13th JUROR.

During the years 1952 through 1957 petitioner received $168,341.03 as a tax-free return on his investment in City of Gary Improvement Contracts and Barrett Bonds. For

the years 1955-56 and '57 the amounts of said tax free funds paid to petitioner were respectively $14,383.48, $7,007.81 and $16,882.52.

Petitioner's expert witness offered his net worth computation (Def. Ex. 22) which, upon objection of the government, was not admitted. Petitioner's expert theory was that as petitioner had re-invested these tax-free funds, it was necessary to deduct as *non-taxable* income the amount received each year; e.g. in the adjustment section of the summary there should be deducted for 1955 the $14,383.48, etc. This theory is based on the explanation of so-called "net worth" summaries set forth in *David H. Schultz*, 30 TC 256 at 275, (rev'd for other grounds, 5 Cir., 278 F. 2d 927); and "A Paper Submitted at a Symposium of the American Bar Association, Section of Taxation on Tax Fraud Procedures and Law" by *Meyer Rothwacks*, Chief, Criminal Section, Department of Justice, dated September 19, 1950, pp. 13-14 (not an official expression of the Department). The trial court's refusal to permit this reasonable theory to be presented to the jury was affirmed by the Court of Appeals which claimed this would be a double deduction.

We submit the refusal is based on a lack of understanding of this dangerous technique which has been developed in recent years and amounts to a violation of the *5th Amendment*. The court's action also disregards the basic law that the jury has the exclusive responsibility of determining the ultimate facts.

The so-called "net worth" summary is a misnomer. The technique ("fraught with danger") has been developed in an attempt to reconstruct current unreported taxable income. It must go beyond the pure net worth, i.e. assets

minus liabilities. The technique properly employed first determines the increase in net worth for a particular year. Then is *added* non-deductible expenses. Then is *deducted* non-taxable receipts, e.g., gifts, inheritances and *non-taxable income*. These deductions are necessary, as said in the *Schultz* case, supra, at p. 275, since such increments to the taxpayer's assets are reflected in the increase of his net worth during the taxable year, and since *they are non-taxable they must be subtracted in order to ascertain the taxable net income for the years in question.*

The government admitted at the trial petitioner received these amounts of non-taxable income; that these monies were plowed back into the other assets of the petitioner in the year received. It therefore follows petitioner's assets were increased by non-taxable funds. The government's theory was that by reducing the running investment in said bonds by the amount received each year the petitioner had received the proper adjustment. This theory supposes the amount received vanished and did not re-appear in the other assets. Yet it admits the tax-free funds were re-invested and are blinded to the fact that in this dangerous technique they now are charging petitioner with unreported taxable income caused by the use of said tax-free funds.

The government and the courts below claim, *without authority*, petitioner's theory is not correct because it would produce a "net worth decrease." This illustrates a lack of understanding of the system. It also illustrates the system should not be used as a basis of depriving a person—by conviction—of his liberty. The end result is *not* a *net worth* increase or decrease. It is supposed to establish unreported taxable income. The petitioner's theory (Def.

Ex. 22) illustrates he had adequate tax-free funds on hand during the entire period. The petitioner's theory will also establish there was no current, unreported taxable income.

The petitioner was permitted to introduce a net worth summary (Def. Ex. 25) computed on the trial court and government's theory.

It is fundamental that a defendant should have the right to explain away the force of a criminal charge. To deprive a defendant of the right to make his explanation of the crime charged is erroneous. The lower court's action conflicts with, *Watkins* v. *U. S.*, 1 Cir., 287 F. 2d 932, 933, 934; *U. S.* v. *Peach Mountain Coal Min. Co., et al*, 2 Cir., 161 F. 2d 476, 478, 479; *Heindel* v. *U. S.*, 6 Cir., 150 F. 2d 493, 497; *Continental Baking Company* v. *U. S.*, 6 Cir., 281 F. 2d 137, 141-143; see also *Wigmore*, (3rd Ed.) Vol. I, Sec. 34, p. 423 and Vol. II, Sec. 239, p. 37; *Wharton's* Criminal Evidence, (12th Ed.) Vol. I., Sec. 211, p. 431.

By depriving a defendant of the right of presenting his defense (on a transaction in which at the trial there was a difference between the Treasury and Justice Departments (App. 737)) there is now established the shocking precedent that if a defendant's theory differs from the government, the defense can be rejected, e.g., disputes on the right to defer income already received but not yet earned; is a certain substance a narcotic; difference between ballistic experts over a fatal bullet. This is a significant departure from traditional precepts of justice.

When a defendant's conviction hangs on the flimsy thread of a technical question as to the right application of $168,341 tax-free funds when the total unreported taxable income claimed only equals $71,585, certainly due

process of law demands the right to present the defendant's theory to the jury. In fact, it is submitted the question really goes to whether the government's summary (Gov. Ex. 186) is correct, and whether the defendant's motion for acquittal was erroneously denied.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. DOWNING,
105 S. LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

APPENDIX "A"

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13717 SEPTEMBER TERM, 1962—JANUARY SESSION, 1963

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

METRO M. HOLOVACHKA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

February 18, 1963

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges.*

HASTINGS, *Chief Judge*. Metro M. Holovachka, defendant-appellant, was charged on January 12, 1962 in a 3-count indictment with violation of Section 7201 of the Internal Revenue Code of 1954.[1] The indictment charged that defendant wilfully attempted to evade and defeat his income

[1] Title 26, U. S. C. A. § 7201: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution."

taxes for the years 1955, 1956 and 1957 by filing false and fraudulent tax returns. The indictment alleged that defendant had reported an income tax liability of $11,893.81 for 1955, $10,486.75 for 1956 and $16,850.87 for 1957, whereas his correct tax liability for those years was $22,151.54, $31,523.91 and $24,893.48, respectively.

Following a jury trial lasting three weeks, defendant was found guilty on all three counts. The district court imposed concurrent sentences of imprisonment for three years on each of the three counts and a fine of $10,000 on Count One. This appeal followed.

The instant indictment was returned and the trial was held in the United States District Court for the Northern District of Indiana, in the city of Hammond, Indiana.

The record shows that defendant was born in Gary, Indiana in 1908, the son of immigrant parents from Czechoslovakia. He was educated in the Gary public schools, attended Purdue University and was graduated from the Washington College of Law in Washington, D. C. He was admitted to the bar and has been practicing law in Gary since 1936. He served as city controller of Gary during 1952. He was elected to and held the office of prosecuting attorney of Lake County, Indiana from January, 1953 through December, 1958.

Defendant lived in Gary, was married and had one son, Demetri, age 23 years. His aged mother was living in Gary at the time of the trial. His sister, Dr. Anne Hopwood, was practicing medicine in Owensboro, Kentucky. His father-in-law, Rev. Alexander Papp, was an ordained priest of the Eastern Rite Catholic Church.

(Opinion of the United States Court of Appeals)

The indictment charged that defendant had attempted to evade federal income taxes by understating his and his wife's taxable income. The theory of the Government's case was that there were large annual increases in defendant's net worth in 1955, 1956 and 1957; that the only reasonable explanation for these increases was that they represented current taxable income; and that the amounts of taxable income proved at the trial were considerably greater than the amounts reported by defendant in his tax returns. This was a typical net worth case.

The errors relied upon for reversal may be generally characterized as concerning the method of impaneling and sequestering the jury; whether the evidence was sufficient to support the jury verdict; and various rulings of the trial court on evidence, motions and instructions before and throughout the trial.

I.

Defendant was first indicted on May 21, 1961 by a grand jury at Hammond charging tax evasion violations for the years 1955 and 1956. On September 28, 1961, the grand jury returned an additional indictment against defendant for the year 1957.

On June 26, 1961, defendant filed a preliminary motion to suppress certain evidence and to inspect the grand jury minutes. This motion was denied by the trial court.

The basis of this motion was that defendant, while serving as prosecuting attorney of Lake County, Indiana, was subpoenaed to produce certain personal records before the Senate Select Committee on Improper Activities in

the Labor or Management Field (McClellan Committee). Defendant alleged that during the period he was under subpoena (May, 1958 until June, 1959), there appeared a series of sensational and inflammatory newspaper articles, headlines and photographs in Gary, Hammond and Chicago newspapers concerning his appearance before the McClellan Committee. Defendant alleged that the result of such publicity was to compel him, as a public official, under the "duress of public pressure," to provide his books and records to the McClellan Committee in violation of his rights under the Fourth and Fifth Amendments, which records and information were subsequently used in connection with the instant prosecution.

Government aptly points out that the motion, on its face, was insufficient to warrant granting the relief sought. It did not identify either the records defendant produced before the McClellan Committee, or the records, and information allegedly obtained therefrom, which he wished to have suppressed. Defendant's motion was based "upon information and belief" and stated that these unspecified records were presented to the grand jury. He claimed it was necessary for him to examine the grand jury minutes in order to prove the allegations of his motion.

Such a motion hardly rises to the standard required to break the secrecy of grand jury proceedings. *Pittsburgh Plate Glass Co.* v. *U. S.*, 360 U.S. 395 (1959); *United States* v. *Greenberg*, D. C. S. D. N. Y., 204 F. Supp. 400, 403 (1962); *United States* v. *Sugarman*, D. C. R. I., 139 F. Supp. 878, 881 (1956); *United States* v. *American Medical Ass'n*, D. C. D. C., 26 F. Supp. 429, 431 (1939). *Cf. United States* v. *Nunan*, 2 Cir., 236 F. 2d 576, 594 (1956), *cert.*

denied, 353 U. S. 912; *United States* v. *Molasky*, 7 Cir., 118 F. 2d 128, 132 (1941), reversed on other grounds *sub nom.*, *United States* v. *Ragen*, 314 U.S. 513 (1942).

Section 134(a) of the Legislative Reorganization Act of 1946, 60 Stat. 831, 2 U. S. C. A. § 190b(a), provides in pertinent part:

> "Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony * * * as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction * * *."

It appears without question that the McClellan Committee was authorized by law to issue subpoenas directed to defendant and his records and that there was no deprivation of his rights under the Fourth Amendment.

The record shows that when defendant appeared before the McClellan Committee he refused to answer certain questions on the ground that the Committee lacked authority to inquire into such matters, and the following exchange then took place:

> "The Chairman: Do you object on the ground that a truthful answer thereto might tend to incriminate you? I want to get the record clear.
>
> "Mr. Holovachka: No, sir."

Defendant is correct in stating that the Fifth Amendment protects against the compulsory production of private books and records, *Boyd* v. *United States*, 116 U. S.

616, 633-35 (1886). However, by failing to invoke the privilege, defendant waived any rights afforded him under the Fifth Amendment. *United States* v. *Murdock*, 284 U. S. 141, 148 (1931).

Defendant further contends that he was prejudicially restricted at this point from establishing the relationship between the activities of the McClellan Committee and the Internal Revenue Service to the events in the instant case. He predicates this curious argument on an expression found in a resolution offered in the Senate, and adopted, on January 25, 1962, authorizing Sinclair, a former Committee staff member "to testify in a criminal case [the instant case] pending before the U. S. District Court for the Northern District of Indiana, *which grew out of an investigation by the Select Committee.*" (Emphasis added.)

From this resolution defendant argues that the "facts clearly suggest and establish a concert of action between the Senate Committee and the Internal Revenue Service." We think defendant's conclusion in this regard is without substance. Assuming, *arguendo*, that it should be seriously considered, we are unable to discern anything illegal or improper in cooperation between the Executive and Legislative arms of the government. We fail to see any deprivation of constitutional rights arising out of such co-operation in the situation under consideration.

We hold that the district court did not err in denying defendant's motion to suppress and to inspect the grand jury minutes. The trial court did not abuse its discretion in so ruling. Although this motion was filed prior to the return of the count for the year 1957, it was considered as addressed to this additional charge.

(Opinion of the United States Court of Appeals)

On June 26, 1961, defendant filed a motion for a bill of particulars addressed to the original indictment concerning the years 1955 and 1956. This was allowed to stand as to the subsequent count for 1957.

In this motion, defendant requested particulars and details concerning the Government's claim of unreported income, disallowed deductions or exemptions and net worth statements upon which the prosecution was to be based.

In response to such motion, Government informed defendant that it proposed to prove his correct taxable income and income tax liability for each year covered by the indictment by the net worth plus non-deductible expenditure method of proof. The trial court denied the motion for a bill of particulars in the light of Government's disclosure of its theory of the case. *Blackwell* v. *United States*, 8 Cir., 244 F. 2d 423, 426 (1957), *cert. denied*, 355 U. S. 838.

We hold that the action of the trial court in so ruling was within the exercise of its sound discretion allowed under Rule 7(f), Federal Rules of Criminal Procedure, 18 U. S. C. A.[2] "The application for a bill of particulars is one addressed to the sound discretion of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed." *Wong Tai* v. *United States*, 273 U. S. 77, 82 (1927); *United States* v. *Doyle*, 7 Cir., 234 F. 2d 788, 794-95 (1956), *cert. denied*, 352 U. S. 893; *Hooper* v. *United States*, 10 Cir., 216 F. 2d 684, 686 (1954); *Rem-*

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[2] Rule 7(f). "Bill of Particulars. The court for cause may direct the filing of a bill of particulars. * * *"

mer v. *United States*, 9 Cir., 205 F. 2d 277, 281-82 (1953), rev'd on other grounds, 347 U. S. 227; *United States* v. *Caserta*, 3 Cir., 199 F. 2d 905, 910 (1952); *United States* v. *Chapman*, 7 Cir., 168 F. 2d 997, 999 (1948), *cert. denied*, 335 U. S. 853.

Defendant was not surprised or prejudiced during the subsequent trial because of this denial. Government, with commendable fairness, entered into a pre-trial stipulation of facts containing 34 specifications and covering numerous exhibits, as evidenced by Government's Exhibit 63. This proved to be a broad disclosure of its case. Government has demonstrated to our satisfaction in its brief that by using the information contained in the stipulation it was possible to substantially reconstruct the entire net worth statement it relied upon in the trial. We find no abuse of discretion on the part of the trial court in denying defendant's motion for a bill of particulars. Under the record before us, we find no occasion to adopt the more "liberal" rule defendant urges upon us.

Following the denial of the foregoing motions filed by defendant, the case was set for trial on November 13, 1961 and trial was commenced on that date.

When the case was first called for trial on November 13, 1961 defendant filed a motion to strike the jury panel because of a newspaper article published in Hammond the preceding day which he considered prejudicial to a fair trial. In support of such motion defense counsel stated to the court:

> "We think that it is again, in view of the results of this jury selection, the number of people from Hammond, and the number of people from this one

precinct, it is a basis indicating that the defendant can not get a fair and impartial trial from this Jury and we ask again that this jury be dismissed and a new panel selected."

Following that motion, and after 29 jurors had been questioned on the *voir dire* examination, defendant again moved to quash and dismiss the entire jury panel and venire called on the ground that the jurors were not properly drawn as required by 28 U. S. C. A. §§ 1861-69. When it became apparent that the names of the prospective jurors had been selected primarily from "P. T. A." lists, Government joined in defendant's motion.

On November 14, 1961, the trial court dismissed the entire jury panel and reset the case for trial for January 22, 1962. The trial court ordered a new panel of 75 persons residing in that part of the Hammond Division, consisting of Lake and Porter Counties, Indiana, drawn for use in the trial on January 22, 1962.

In the meantime, on January 12, 1962, a new grand jury returned a superseding indictment and, by agreement of the parties, all previous motions and proceedings were ordered made a part of the record. Subsequently, on motion of Government, the original indictments were dismissed after the arraignment and plea in the instant case.

On January 12, 1962, the day the superseding indictment was returned, one of the local newspapers in Hammond printed another article concerning defendant in much the same tenor as the one previously objected to. While the parties were in court on that date defendant was granted a further delay and the trial was reset for January 29, 1962. At that time the trial court discussed with the

parties the subject of an impartial trial before an impartial jury and suggested the possibility of removing the trial to Lafayette, Indiana. Lafayette is another place for holding court in the Northern District of Indiana and is about 100 miles distant from Hammond. Defendant objected to this removal and insisted on his right to trial in Hammond, in his home county, and again expressed his concern about the problem of newspaper publicity in that community. Since defendant did not agree to the change of venue, it was not ordered.

On January 17, 1962, the district court, *sua sponte*, dismissed the entire panel of petit jurors drawn January 2, 1962 over objection of defendant. The district court then ordered a new list of jurors drawn from those jurors residing in the South Bend and Hammond Divisions and ordered the exclusion therefrom of those who resided in Lake and Porter Counties, the areas where the alleged prejudicial newspaper articles had circulated. Defendant objected to the dismissal of the petit jury drawn January 2, 1962 and moved to quash and dismiss the entire panel, venire and petit jury drawn on January 17, 1962 on the ground that he was thereby denied the right to a fair and impartial jury trial. The Northern District of Indiana is divided into the Fort Wayne, South Bend and Hammond Divisions. 28 U. S. C. A. § 94.

On January 23, 1962, with the parties and counsel present in court, the trial court denied defendant's motion to quash the jury panel drawn January 17, 1962. In making its ruling the trial court reviewed at length the prior record in the case relating to newspaper publicity and impartial jurors. It took note of the recent decision of *United States* v. *Accardo*, 7 Cir., 298 F. 2d 133 (1962), and of

28 U. S. C. A. § 1865. The trial was ordered to proceed on January 29, 1962 with the jury to be selected from the panel drawn on January 17, 1962.

Defendant contends that he was "biased, prejudiced and deprived of a fair and impartial jury trial by the arbitrary action of the court." We think the most effective answer to this charge of arbitrary action by the trial court is to quote in the margin the reasons given by that court for its ruling.[1] We find no error or abuse of discretion in this

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[1] 1865(a) provides: "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. * * *"

"* * * in a careful study of the opinion of the Seventh Circuit Court of Appeals [United States v. Accardo, *supra*] and of recent and earlier pronouncements by the Supreme Court of the United States that I feel brought into sharp focus the accumulation of events in the case before us that led up to this Order of January 17, 1962, and these decisions by these Courts caused us to re-examine or re-evaluate our own proceedings in this cause with a renewed determination to do what we can to insure to the Defendant an impartial trial before an impartial Jury. I think it is agreed by all that it was quite clear at the conference that we have already referred to that if the Defendant had made a motion on his part to transfer the place for holding this trial, that that motion would have been granted; but the Defendant, as is his right and was his right, chose not to make such a motion and in the absence of such a motion it became obvious to this Court that in the light of the repeated protestations of the Defendant himself through his able Counsel in this cause leading up to and including the re-write of the al-

ruling. We do find that the trial court went to every permissible length to insure defendant a trial by a fair and impartial jury.

Subsequently, the trial court denied defendant's further motion to dismiss the instant indictment on the ground that the new grand jury which returned the superseding indictment contained residents of Lake and Porter Counties. This denial was proper and we find no error in this ruling.

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(6) *Continued*

leged objectionable material that came on the day that the superseding Indictment was returned, it seemed obvious to this Court that further action immediately be taken to insure an impartial Jury.

"Referring again to Section 1865, it says that Grand and Petit Jurors shall from time to time be selected from such parts of the District as the Court directs so as to be most favorable to an impartial trial and not to incur unnecessary expenses or unduly burden the citizens of any part of the District with Jury service; if we drew several hundred people as prospective Jurors from this Hammond area, the area served by these newspapers about which the Defendant has complained, this Court would feel, in light of these new pronouncements of the Circuit Court of Appeals, that we would have to go a long, long way in excusing anybody as a Juror who had been following these stories about which the Defendant complained. This would have been the kind of an unjust expense as contemplated by this Section 1865. Likewise it would create an unnecessary expense within the meaning of that section of the Code to bring prospective Jurors in from the Fort Wayne Division of this Court, an area some 150 miles and more, in many places, from this Hammond Court Room.

"One obvious conclusion remained, and that was to ex-

(Opinion of the United States Court of Appeals)

When the case was called for trial on January 29, 1962 one of defendant's first moves was to call the trial court's attention to recent newspaper publicity in Gary and Hammond newspapers claimed to be prejudicial and he then moved for a three months continuance. The motion was denied.

Thereupon the jury of twelve men and women and four alternate jurors were impaneled and sworn. The trial court, *sua sponte*, then ordered that the jury remain together until the conclusion of the trial over objection of defendant. This order of sequestration was preceded by an explanation to the jury of the trial court's reasons for making it. Defendant's objections were overruled and we find no error. Again, we believe the best answer to defendant's claim of prejudice is to set out in the margin the

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(9) *Continued*

clude from the Order for the Jury to be called for duty in this case, the citizens from the Lake County and Porter County area that in the past have served to supply Jurors for this Court, and also to exclude from the Order those Jurors who live at the farthest and most remote parts of the District because of the expense involved in that long travel.

"Accordingly it was, on the 17th of January at the time this Order was entered, in the opinion of this Court necessary to provide an impartial Jury, a Jury that would be most favorable to an impartial trial, and furthermore so as not to incur unnecessary expenses or unduly burden the citizens of any part of this District with Jury service that this Court on the 17th of January entered that finding, and the Order that ensued.

"This Court is of the same opinion still. Nothing by the Defendant has pointed to the contrary. The motion of the Defendant to quash the panel is denied."

exact language of the trial court in this regard.[5] The trial court further ordered that the court continue in session six days a week.

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[5] "Ladies and Gentlemen of the Jury, I should like to ask your careful attention to a statement that the Court has prepared and wants now to make to you, the members of this Jury.

"The Court has given long and careful consideration to the necessity for the action which we are about to take in this case. In arriving at the course of action we have weighed all of the factors in favor of safeguarding the rights of the parties to a fair and impartial trial and to preventing embarrassing incidents to the members of the Jury as well and, of course, the inconvenience to the individual Jurors.

"After a careful consideration of all of the fore-going, after the selection of the Jury and the four alternates, and after they were duly administered the oath to try the case, and before any adjournment, before the opening statements, and before the introduction of any evidence, the Court now on its own motion, without the sanction or request of either the Government or the Defendant, in fact without consultation with either side, the Court now Orders this Jury and the four alternates to remain together in a body until you are discharged from your further consideration of this case, or until further Order of this Court, and until discharge of the Alternates as provided by law when the Jury retires to deliberate.

"The United States Marshal has arranged for separate adequate and comfortable lodging accommodations for the male Jurors and adjacent lodging accommodations for the male officers sworn to attend them, and separate and adequate and comfortable lodging accommodations for the women Jurors and adjacent lodging accommodations for the women officers sworn to attend them, and the Marshal

Opinion of the United States Court of Appeals

Defendant charges that sequestration of the jury was coercive in its effect on the verdict of the jury. We do not agree.

Both parties cite many decisions in support of their contentions relative to the method of selection and the sequestration of jurors. There is no dispute about these holdings. We need not review them here.

It is quite clear to us, as it was to the trial court, that because of the local prominence of defendant, the problem of adverse newspaper and other publicity was to be an important factor in defendant's trial strategy. This was a proper element for defendant to consider. It is equally apparent to us that the trial court's decision to sequester the jury, designed as it was to insulate the jurors from local prejudice, was a sound exercise of its discretion.

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(3) *Continued*

has also arranged all necessary transportation for the Jury during the trial of this cause.

"The United States Marshal and his deputies who have been sworn to attend this Jury are directed to arrange for the necessary reading material as requested by the Jurors, such as newspapers, magazines, and the like, but before delivery to the Jurors the Court Orders that such officers delete therefrom any printed matter therein concerning the trial of this case.

. . . . .

"The Jury is Ordered not to communicate with anyone nor to permit anyone to communicate with you except among yourselves, the officers who are in charge of the Jury, your immediate family and possibly with reference to your business and or employment, but then only

Holt v. United States, 218 U.S. 245, 250-51 (1910); *Janko v. United States*, 8 Cir., 281 F. 2d 156, 170 (1960), reversed on other grounds, 366 U.S. 716 (1961); *Kleven v. United States*, 8 Cir., 240 F. 2d 270, 273 n. 1 and cases cited therein (1957); *Tinkoff v. United States*, 7 Cir., 86 F. 2d 868, 879 (1936), cert. denied, 301 U.S. 689.

District courts and courts of appeal have an awareness of the ever increasing problems inherent in conducting a jury trial in the spotlight of publicity. *Cf. Irvin v. Dowd*, 366 U.S. 717 (1961); *United States v. Accardo*, 7 Cir., 298 F. 2d 133 (1962). Modern forms of news media, in the proper exercise of their functions, have made it necessary for the courts to reappraise the elements creating the atmosphere in which one charged with a crime is given his right to a fair and impartial public trial by jury. Reasonable solutions will be found by the courts as varying situations are presented for review.

In this case the trial court caught the swing of the pendulum at one end of its sweep. Our careful scrutiny

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(3) *Continued*
in the presence of the Marshal or one of his deputies. However, you should not communicate among yourselves or with anyone at all about this case.

"You are instructed to refrain from listening to or watching any news programs on radio or television. As stated before, newspapers will be provided you after any news stories concerning this trial shall have been first deleted. You will also abide by all oral directions concerning your conduct as Jurors which have been given you by the Court during the day on your voir dire examination which has just been completed."

of the record leads us to the positive conclusion that the steps taken in selecting and sequestering the petit jurors were dictated solely by the trial court's deep concern for defendant's constitutional rights. Defendant's rights were not prejudiced by the actions of the trial court; they were preserved for him in every reasonable way short of trial in a vacuum.

In sum, we hold that there was no prejudicial error in this cause preliminary to the introduction of evidence.

II.

Defendant contends the evidence is not sufficient to support the verdict of the jury finding him guilty on all three counts of the indictment. We have reviewed the evidence in the light most favorable to Government, as we are required to do on this appeal. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Agcardo*, 7 Cir., 298 F. 2d 133, 135 (1962); *United States* v. *Achilli*, 7 Cir., 234 F. 2d 797, 803 (1956), aff'd, 353 U.S. 373. It is our fixed conclusion and considered determination that there was more than a substantial basis on this record to justify the guilty verdict. Of this we have no doubt.

In passing, we observe from defendant's brief and oral argument that his arguments on the evidentiary question are presented by viewing the evidence in the light most favorable to himself.

The transcript of the testimony and documentary evidence is voluminous. We shall not attempt to recite it in detail here. We shall give attention to some of the salient points concerning which there is dispute.

(Opinion of the United States Court of Appeals)

The testimony concerning the preindictment investigations conducted by the revenue agents established the necessity for the adoption of the net worth method. Defendant's records were wholly inadequate to serve as a basis for determining his correct income tax liability. Defendant's lack of memory and apparent discrepancies in some of his statements served to shed little light on his professional and business transactions or the sources of his income.

Government used December 31, 1951 as the starting point for its net worth computation in order to establish the pattern of underreporting followed by defendant down through the critical years 1955, 1956 and 1957. Defendant was interviewed a number of times by the revenue agents. He first explained that the net worth increases in 1952 and 1953 were due to a cash loan of between fifteen and twenty thousand dollars he had received from his father prior to 1952. He could not recall any amounts of cash on hand which he had at the end of 1951 or 1952. He said he had received no other funds from a non-taxable source.

Defendant afterwards stated to an agent that except for a few canceled checks he had previously furnished, he had disposed of all his canceled checks during the years 1954 through 1958. He then stated that the loan from his father amounted to $27,500 and that he received it in three installments during 1952 and 1953. He told the agent he had received nothing from his wife's relatives. Yet, about three months later he said that in 1952 or 1953 his wife had given him $20,000 which she had received as a gift from her parents. He subsequently told the agent that this $20,000 was spent by him in 1955 on the construction of a new house.

(Opinion of the United States Court of Appeals)

Defendant reported professional net income of $24,500.70 in 1953, $22,355.74 in 1956 and $33,724.97 in 1957. When asked to exhibit his records supporting these figures he made available the books and records maintained in his Gary law office by his secretary. The legal fees reflected in these office records revealed $2,736.86 in 1953, $1,388.08 in 1956 and $2,314.54 in 1957. To explain this discrepancy of more than 90% between the totals in his tax returns and the totals in his office books, defendant stated he had kept his own private records of professional income received outside his Gary office, but that these records had either been lost or stolen.

He subsequently told the agents he had had substantial amounts of cash on hand at times during the period under examination, but he could not recall either the amounts or the time when he possessed such cash. He could not recall the source of his income appearing in his 1953 and 1954 returns, including $12,000 in "Miscellaneous Income" in his 1953 return.

Government prepared and introduced in evidence its net worth statement visually portraying defendant's tax deficiencies for the three years involved. Defendant prepared and introduced a counter net worth statement for the same period substantially negating the net worth increases in Government's statement. The jury could have reasonably accepted the Government's statement as true and established by the evidence and would have been justified in rejecting the contrary items in defendant's statement.

(1) *Cash on hand.* Government allowed no cash on hand. Defendant could not state when or how much cash

he had on hand. The evidence established that defendant's wife had no appreciable separate income. From 1945 to 1951, when defendant was claiming five dependents, he reported an average annual adjusted gross income of about $4,800. Defendant and his wife borrowed substantial amounts of money from financial institutions and other sources in 1940, 1943, 1950 and 1953. He admitted he did not borrow when he had cash on hand. Although during the investigation defendant claimed to have large, undisclosed amounts of cash on hand prior to 1955, his own net worth statement reflected only the monies which he and his wife allegedly received from their respective parents. The jury was warranted in crediting Government's version of this proposition.

(2) *Alleged $27,500 loan from defendant's father.* Defendant testified he did not recall whether any part of the $27,500 borrowed from his father in 1952 and 1953 remained on hand during either of those years or in 1954. There was credible evidence from which the jury could have believed and found that defendant's father could not have accumulated that much money to make such a loan. His earnings were meager prior to his retirement in 1941, and he had no substantial employment thereafter. Defendant claimed his father and mother as dependents on his federal income tax returns for the years 1945 through 1951. Defendant wrote a letter to the Internal Revenue Service in 1952 stating his parents had an income of less than $50 per month. He never repaid the alleged loan to his father. His sister contributed to the support of the parents. His father died in 1953.

(3). *Alleged $20,000 gift to defendant's wife.* Late in the investigation by the agents, defendant for the first time reported that his wife received a gift of $20,000 in currency from her mother shortly before her mother's death in 1953. Defendant's wife was not called to testify at the trial. Defendant's father-in-law, Father Papp, testified that in June, 1953 he was present when his wife made a gift of $20,000 in currency to their daughter, defendant's wife, to be used for the purpose of building a home. On cross examination, Father Papp admitted that he had never before seen this $20,000 in currency and that his wife had never informed him that she had it. It was further brought out that the witness had stated before the grand jury he did not know of this occurrence of his own knowledge but had relied on his wife's statement to that effect. Treating this testimony in a charitable manner, the jury could have reasonably concluded that Father Papp was mistaken. It could have believed that such a gift was never made.

(4) *Alleged $14,745 loan to defendant's nephew.* Defendant's nephew, Michael Ksenac, testified that in 1957 he paid $14,745 for a new house in Gary, and that he had received the entire sum in currency as a loan, allegedly arranged by defendant. He said he later learned the money came from his grandmother (defendant's mother), who resided with him. Defendant testified that the money was loaned by his mother who wanted to keep it a secret from another grandchild. Ksenac was repaying the loan in installments by making deposits to defendant's credit in a local savings account. Defendant testified he was keeping this money for his mother but had never paid any part of

it to her. There was credible evidence from which the jury could have believed that defendant's mother would not have had $14,745 in currency in 1957 and that she did not furnish the money to defendant for that purpose. It is conceded that at the time of the trial defendant's mother could not be called to testify because of her advanced age and illness.

(5) *Alleged $16,000 loan from Judge Murray.* Defendant testified that on May 20, 1956, at a time when he was prosecuting attorney of Lake County, Indiana, he borrowed $16,000 from Judge William J. Murray, who was then Judge of the Criminal Court of Lake County. He introduced in evidence a promissory note reciting such a loan. On the note, written in pencil, was a notation that it was repaid on March 3, 1958. Defendant's net worth statement reflected this alleged loan as a liability for the years 1956 and 1957. Judge Murray died in December, 1959. Defendant did not recall whether he received the loan by check or in cash or for what purpose he used the money. He allegedly repaid the loan in cash and had no other evidence of such repayment except the unsigned pencil notation. Although he claimed to have the need to borrow this money on May 20, 1956, there was evidence that on the same date he and his wife loaned $8,000 to one Kampo. Shortly after giving his testimony about the loan from Judge Murray, defendant testified on cross examination that he had met Judge Murray's son who said to defendant he could not believe the story because his father did not have $16,000 to lend anyone and that his mother did not know about it. Prior to the trial, defendant had never reported such a loan to the investigating agents or claimed such a loan

as a source of cash receipts. The jury was reasonably justified in rejecting defendant's testimony and in concluding that such a loan was never made.

(6) *Barrett Bonds.* Defendant purchased for his own investment purposes certain Gary street improvement contracts and bonds, known as Barrett Bonds. He purchased $31,109.98 in 1952, $156,148.66 in 1953 and $9,940 in 1957. During the years 1953 through 1957, defendant received a total of $168,341.03 with respect to this investment, representing repayment of principal and earned interest. It is admitted that the interest on such bonds is non-taxable. Government and defendant remain in sharp disagreement as to the proper manner in which these repayments of principal and interest should be reflected in the net worth statement.

Government treated the principal repayments as a tax free return of capital which correspondingly decreased defendant's investments in such bonds for those years. The yearly interest payments received on these bonds were considered to be tax free and were accordingly deducted from defendant's net worth. The trial court properly instructed the jury that the repayments of principal and the earned interest constituted non-taxable income.

Defendant asserts prejudicial error in the trial court's denial of his right to introduce his own net worth statement presenting a different theory of the case with respect to the return of his principal investment in the Barrett Bonds. Defendant sought not only to reduce his annual running investment in these bonds to the extent of the principal payments received each year, as was done by Government, but also to deduct such amounts from his net

worth in order to arrive at his correct taxable income. Defendant asserts that such annual returns of principal received on these bonds each year must be deducted in the "Adjustments" portion of the net worth statement, as was done with the non-taxable bond interest.

The trial court properly sustained Government's objection to defendant's method of accounting on the ground that under defendant's theory he would be erroneously permitted to deduct the yearly returns of his principal investment from his net worth. To that extent, defendant would produce a net worth decrease. The trial court properly held that the Barrett Bonds should be treated in the net worth statement in the same manner as other assets appearing therein, at their absolute annual cost. There was no error in rejecting defendant's offer of his original net worth statement based on this erroneous theory. *United States* v. *Kiamie*, 2 Cir., 258 F. 2d 924, 933 (1959), cert. denied, 358 U.S. 909; *Clark* v. *United States*, 8 Cir., 211 F. 2d 100, 105 (1954), cert. denied, 348 U.S. 911. Defendant then recast his statement in the light of this ruling and such net worth statement was properly received in evidence.

(7) *Lovelace transaction.* This transaction concerns whether an asset of approximately $11,000 allegedly acquired in 1948 or 1949 should be included as an asset of defendant in the net worth statement. Defendant claimed to have purchased real estate from his parents and then to have resold it on contract to Lovelace. Without detailing the facts, which we have carefully reviewed, it is our conclusion that the jury was warranted in finding that the beneficial interest in the property remained in defendant's parents, even though in form defendant ostensibly owned

the real estate. Government did not err in excluding this as an asset of defendant.

(8) *Campaign expenditures.* Government included in its net worth statement as non-deductible, personal expenditures for the years 1952 and 1954 the sums expended by defendant for election expenses in his campaign for Lake County Prosecutor. This amounted to $4,152.90 in 1952 and $10,994.64 in 1954. This was based on defendant's sworn statement of his campaign expenses filed pursuant to law.

Defendant contends that none of these expenses were in fact expended from his own resources but that all were contributed by his friends. Defendant was unable to produce any records supporting such a claim or furnish the agent with the name of any individual contributor.

The jury could have reasonably credited Government's contention on this item.

(9) *Other items.* Aside from the treatment of an item of $1,000 related to a transaction involving the State-Sibley Corporation and an alleged gift of $1,500 by defendant to his son, Demetri, the foregoing items represent the major differences in Government's and defendant's net worth statements. The last two minor items appear to have been properly treated by Government.

In conclusion, we hold that the net worth statement prepared by Government correctly revealed the failure of defendant to report taxable income of $18,718.06 in 1955, $22,329.43 in 1956 and $15,885.07 in 1957, and that under the record in this case the jury was warranted in so finding.

III.

Contrary to defendant's contentions, we hold that Government discharged its burden of establishing beyond a reasonable doubt the elements essential to conviction in a net worth case.

It was established beyond a reasonable doubt that there was a substantial tax due and owing from defendant for the years in question. "[I]t is not necessary to prove the exact amount of deficiency averred in the indictment. It is sufficient to prove that a substantial amount of tax liability has been willfully averted." *United States* v. *Doyle*, 7 Cir., 234 F. 2d 788, 794 (1956), cert. denied, 352 U. S. 893; *United States* v. *Achilli*, 7 Cir., 234 F. 2d 797, 805 (1956), aff'd, 353 U. S. 373.

Defendant concedes an underreporting of income of $6,106.09 for the year 1956. He offered his own net worth statement and examined the revenue agent with reference to each of the items in the net worth statements in dispute. Government followed the same pattern. It became a question of fact for the jury to decide. We need not further review the evidence on this score.

It was established beyond a reasonable doubt that the tax deficiencies arose from some taxable source of income. *Holland* v. *United States*, 348 U. S. 121, 137 (1954). In the instant case, Government adequately negated "all the possible nontaxable sources of the alleged net worth increases—gifts, loans, inheritances, etc." *Id.* at 137. Government adequately demonstrated through its proof of defendant's financial history prior to the net worth starting point that there was no likelihood of any previously accumulated cash hoard.

In *United States* v. *Massei*, 355 U. S. 595 (1958), the Supreme Court announced the following interpretation of the holding in *Holland* relating to the necessity of "proof of likely source" of income:

> "* * * In *Holland* we held that proof of a likely source was 'sufficient' to convict in a net worth case where the Government did not negative all the possible nontaxable sources of the alleged net worth increase. This was not intended to imply that proof of a likely source was necessary in every case. On the contrary, should all possible sources of non-taxable income be negatived, there would be no necessity for proof of a likely source." * * *

After offering evidence to rebut defendant's explanations of his increased net worth, Government then turned to the only remaining source of income—his professional income from his law practice. As we have previously pointed out, here Government was frustrated because of lack of adequate records and was compelled to resort to the net worth method. In this case, "the Government's detailed investigation was a complete answer to the petitioners' explanations." *Holland* v. *United States*, *supra* at 136. Government's evidence on this proposition "was sufficient to convict."

The final essential element is that defendant had engaged in a willful attempt to evade and defeat the tax. *Spies* v. *United States*, 317 U. S. 492, 499-500 (1943). A fair statement of the rule is that willfulness "involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income." *Holland* v. *United States*, *supra* at 139.

As Mr. Justice Clark said in *Holland*:

> "Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand." *Id.* at 139.

This language applies with equal force to the case at bar.

We need not repeat the evidence showing defendant's failure to keep adequate records of his professional income in his law office books; the destruction or loss of the professional income record books defendant kept privately outside his office; and the destruction of substantially all his canceled checks for the years 1954 through 1958. These matters were pertinent on the issue of concealment. *Garicpy* v. *United States*, 6 Cir., 189 F. 2d 459, 463 (1951); *Yoffe* v. *United States*, 1 Cir., 153 F. 2d 570, 573-74 (1946).

Government established that defendant's financial transactions during the years 1952 through 1957 were carried on largely through the use of currency, totalling $342,919 in that period. Defendant's explanation was that this was a habit he acquired from his parents. He stated that the records disclosing the source of this substantial amount of currency were lost. This was a factor to be considered by the jury on the issue of willfulness. *Schuermann* v. *United States*, 8 Cir., 174 F. 2d 397, 398 (1949), cert. denied, 338 U. S. 831; *United States* v. *Chapman*, 7 Cir., 168 F. 2d 997, 999-1000, 1003 (1948), cert. denied, 335 U. S. 853.

There was considerable evidence, largely undisputed, of defendant's practice of causing certain assets owned by him to be placed in the names of certain corporation-

controlled by him and in the names of various relatives. Although defendant asserted this was not done to conceal his assets, it was another link in the chain of circumstances the jury might properly consider on this issue. *Spies* v. *United States*, 317 U. S. 492, 499 (1943); *Cleun* v. *United States*, 4 Cir., 228 F. 2d 151, 154 (1955).

Having in mind the admonitions of the Supreme Court in *Holland* v. *United States*, *supra* with reference to the rather strict requirements in the use of the net worth method in prosecution of tax-evasion cases, we conclude that those standards have been fully met in the case before us. The essential elements of the crime charged have been proved beyond a reasonable doubt by competent evidence and the jury was justified in so finding by its verdict.

IV.

Finally, defendant claims prejudicial error in certain rulings of the trial court and by alleged misconduct of a Government attorney.

Government witness Sinclair, a former investigator for the McClellan Committee, testified concerning certain of defendant's records subpoenaed by the Committee. On cross examination by defense counsel, in answer to a question concerning what he did with the information obtained from defendant, the witness stated that he "used it as a basis to testify before the Labor Rackets Committee in Washington, D. C. in June of 1959."

Defendant complained of the use of the word "Rackets" in the answer to this question. The trial court denied a motion for mistrial. There was no further use of the word

in that connection and we find no reversible error in the ruling of the trial court.

Defendant claims error in the asking of three questions by Government which related to the McClellan Committee hearings. These were minute matters and in each instance the trial court sustained defendant's objections, struck the questions and answers and directed the jury to disregard them. There was no ground for a mistrial in this respect.

Defendant made no objection to any remarks of Government counsel during the closing argument. When the argument had concluded, defendant offered two objections. He claimed that on five separate occasions Government counsel expressed his personal belief on certain matters in the case. He further claimed prejudice when Government counsel stated his belief that the late Judge Murray would not violate the Code of Ethics by loaning defendant $16,000 when defendant was appearing before him as a prosecuting attorney.

We have examined all these allegedly prejudicial comments in the context in which they were made and find no prejudicial effect on the jury or on defendant's right to a fair trial. The jury was adequately instructed at the beginning and end of the trial that statements made by counsel were not evidence.

Defendant asserts error on three items of evidence he claims were erroneously admitted by the trial court. We have examined these claims and find them to be inconsequential and without merit.

Defendant assigns as error other rulings of the trial court with reference to cross examination of certain witnesses and the use of certain documents in such cross

examination. We have examined each of these contentions in the context of the record when made and find no prejudicial error in the challenged rulings of the court. The trial court extended defendant a wide latitude in his cross examination of witnesses.

In examining the entire record in this case, we conclude that the trial judge made his rulings without bias or prejudice and with a determination to insure to defendant and Government a fair trial. We find his rulings on all propositions were uniformly correct in so far as any bitterly contested criminal trial lasting three weeks can be free of error. We find no prejudice was done to defendant.

Defendant charges that two instructions to the jury requested by Government and given over his objection and the refusal of the trial court to give fourteen instructions tendered by him constituted error.

Although not waiving his contention on the jury instructions, defendant does not seriously argue the matter, devoting less than one page of an otherwise voluminous brief to it. We have examined the record and after a careful review of the instructions given and refused find that the jury was adequately and fairly charged.

The trial court correctly charged the jury on the net worth method of proof and the essential elements of such proof as it related to the crimes charged. Some of the instructions refused were covered by the court's own instructions. Some were modified and given, and others were properly refused. It is sufficient for us to say that the jury was properly charged, and we find no reversible error therein or in the refusal of certain requested instructions.

(Opinion of the United States Court of Appeals)

Finding no prejudicial error and finding further that defendant received a fair trial, that the evidence of guilt warranted the jury's verdict and that substantial justice has been done, the judgment of conviction is affirmed.

Affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13517 SEPTEMBER TERM, 1962—JANUARY SESSION, 1963

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

METRO M. HOLOVACHKA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Monday, February 18, 1963

Before Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham B. Castle, Circuit Judge

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the Judgment of said District Court in this cause appealed from be and the same is hereby affirmed in accordance with the opinion of this Court filed this day.

APPENDIX "C"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fifth Amendment provides, in pertinent part:

> "No person shall be * * * deprived of life, liberty or property, without due process of law * * *"

The Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed * * *."

26 U.S.C.A., Sec. 7201 provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

28 U.S.C.A., Sec. 1865(a) provides:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense

or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place."

Federal Rules of Criminal Procedure, Rule 18 provides:

"District and Division. Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

Rule 19 provides:

"Transfer Within the District. In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, if the defendant consents, in any division and at any time."

Rule 21(a) provides:

"For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

(Constitutional Provisions and Statutes Involved)

General Information and Orders,
United States District Court for the
Northern District of Indiana provides, in pertinent part:

> "By order of the court a division of the business of the Hammond Division has been effected whereby causes of action arising in the counties of Benton, Carroll, Jasper, Newton, Tippecanoe, Warren and White shall be filed at Lafayette; that causes of action arising in the counties of Lake and Porter shall be filed at Hammond."

SUPREME COURT, U.S.
Office-Supreme Court, U.S.
FILED
NOV 24 1962
JOHN F. DAVIS, CLERK

No. 1966

In the Supreme Court of the United States

October Term, 1962

MARIO M. HOLZOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LEON ULMAN,
Assistant Attorney General,

JOSEPH M. HOWARD,
Special Assistant,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	12

CITATIONS

Agnew v. *United States*, 165 U.S. 36	6
Connelly v. *United States*, 249 F. 2d 576, certiorari denied, 356 U.S. 921	6
Frantz v. *United States*, 62 F. 2d 737	6
Frazier v. *United States*, 335 U.S. 497	5
Holland v. *United States*, 348 U.S. 121	9
Holt v. *United States*, 218 U.S. 245	7
Janko v. *United States*, 281 F. 2d 156, reversed, 366 U.S. 716	7
Jarl v. *United States*, 19 F. 2d 891	6
Kleven v. *United States*, 240 F. 2d 270	7
Lewis v. *United States*, 279 U.S. 63	5
Myers v. *United States*, 15 F. 2d 977	6
Ruthenberg v. *United States*, 245 U.S. 480	6
Ryan v. *United States*, 99 F. 2d 864	6
Spencer v. *United States*, 169 Fed. 562	6
Spies v. *United States*, 317 U.S. 492	10
Stroud v. *United States*, 251 U.S. 15	5
Thiel v. *Southern Pac. Co.* 328 U.S. 217	5
Tinkoff v. *United States*, 86 F. 2d 868, certiorari denied, 301 U.S. 689	7
United States v. *Alker*, 260 F. 2d 135, certiorari denied, 359 U.S. 906	10
United States v. *Ford*, 237 F. 2d 57, certiorari granted, 352 U.S. 1000, certiorari dismissed, 355 U.S. 38	9

Cases—Continued Page

United States v. *Skidmore*, 123 F. 2d 604, certiorari denied, 315 U.S. 800 6
United States v. *Taylor*, 305 F. 2d 183 10
United States v. *Wood*, 299 U.S. 123 5
Walker v. *United States*, 93 F. 2d 383 6
Walker v. *United States*, 116 F. 2d 458 6

Statutes:

Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 1958 ed., Sec. 7201) 2, 3
28 U.S.C., Sec. 1865(a) 5

Miscellaneous:

Hearings before the Select Committee on Improper Activities in the Labor or Management Field, United States Senate, 86th Cong., 1st Sess., Part 53, pp. 18779-18780 8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1046

METRO M. HOLOVACHKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 314 F. 2d 345. (Pet. 1a-32a.)

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1963. (Pet. 33a.) Petition for rehearing was denied by the court *en banc* on March 28, 1963. The petition for a writ of certiorari was filed on April 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in excluding residents of Lake and Porter Counties from the petit jury panel, or in ordering that the jury not be permitted to separate during the trial of the case.

2. Whether petitioner was prejudiced by the conduct of the prosecuting attorney or the rulings of the District Court.

3. Whether the evidence was sufficient to support the verdict.

4. Whether the District Court properly excluded certain evidence offered by petitioner.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

STATEMENT

On January 12, 1962, an indictment in three counts was filed against petitioner in the United States District Court for the Northern District of Indiana,

charging that he had wilfully attempted to evade and defeat his income taxes for the years 1955, 1956, and 1957 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that he had reported an income tax liability of $11,893.81 for 1955, $10,486.75 for 1956, and $16,850.87 for 1957, whereas his correct tax liability for those years was $22,151.54, $31,523.91 and $24,893.48 respectively. (R. 10-12.)[1] After a jury trial lasting three weeks, petitioner was found guilty on all counts. On March 16, 1962, the District Court imposed concurrent sentences of imprisonment for three years on each of these counts, and a fine of $10,000 on Count One. (R. 59-60.) The Court of Appeals affirmed. (Pet. 1a-32a.)

The evidence to support the verdict of guilt is reviewed at length in the opinion of the Court of Appeals (Pet. 17a-24a), to which the Court is respectfully referred. The particular facts with respect to each of the points raised by petitioner are presented below in connection with our discussion of those issues.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 9-13) that he was prejudiced when the trial court excluded residents of Lake and Porter counties from the petit jury panel.

On November 13, 1961, the date this case was or-

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[1] References to petitioner's appendix in the Court of Appeals will be designated "R."

iginally set for trial, petitioner filed a motion to strike the jury panel on the ground that a newspaper story, appearing the previous day in the "Hammond Times", had created an atmosphere prejudicial to a fair trial. (R. 89.) In support of this motion, petitioner's counsel stated (R. 89):

> We think that it is again, in view of the results of this Jury selection, the number of people from Hammond, and the number of people from this one precinct, it is a basis indicating that the Defendant can not get a fair and impartial trial from this Jury and we ask again that this Jury be dismissed and a new panel selected.

Following the dismissal of the original jury panel on the ground that it was illegally constituted (see Pet. 4), a new trial date was set for January 22, 1962. On January 12, 1962, after a superseding indictment was returned against petitioner,[2] there appeared a front page article in the "Gary Post Tribune" which repeated much of the material about which petitioner had previously complained to the court. (R. 90-91.) As a result of the widespread publicity given this matter, the trial court, after careful consideration and in order to insure a trial before an impartial jury, (R. 65-95), ordered the exclusion from the panel of jurors who resided in Lake and Porter Counties, the areas in which the newspaper articles had circulated.

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[2] The original indictment, upon motion of the Government, was dismissed on the ground that the grand jury was illegally constituted. (See Pet. 4.)

Petitioner, who first complained that, in view of the unfavorable publicity, he could not obtain an impartial jury from the Gary and Hammond areas (R. 89), now contends that he was prejudiced by excluding those areas from the district from which the panel of talesmen was drawn. We submit that, on the contrary, Judge Grant's order implemented the command of 28 U. S. C. Section 1865 (a) that:

> * * * petit jurors shall from time to time be selected from such parts of the district as the court directs *so as to be most favorable to an impartial trial*, * * * (Emphasis supplied.)

Since the "mode in which the jury shall be selected" was left by the Sixth Amendment "in the discretion of the legislature, with no restriction or limitation, except that the accused should have the right to be tried by an impartial jury" (*United States* v. *Wood*, 299 U. S. 123, 146; *Frazier* v. *United States*, 335 U. S. 497, 511), the proper inquiry is whether the jury was selected from such parts of the district "so as to be most favorable to an impartial trial" within the meaning of the statute. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 221. This determination of necessity calls for an exercise of discretion by the trial court (*Frazier* v. *United States*, *supra*, p. 511; *Stroud* v. *United States*, 251 U.S. 15, 20), and there is no showing of abuse in this case.

The selection of an impartial jury from part of a district to avoid local prejudice has been consistently sanctioned by this Court. *Lewis* v. *United States*, 279 U. S. 63, 72; *Stroud* v. *United States*, *supra*, pp. 18-20 (exclusion of county of Leavenworth on claim of

local prejudice); *Ruthenberg* v. *United States*, 245 U. S. 480, 482; *Agnew* v. *United States*, 165 U. S. 36, 42-45. The courts of appeals have approved similar action on closely analogous facts. *Spencer* v. *United States*, 169 Fed. 562 (C. A. 8) (order excluded jurors from Polk County, Iowa, including the city of Des Moines); *Jarl* v. *United States*, 19 F. 2d 891, 894-895 (C. A. 8), and *Myers* v. *United States*, 15 F. 2d 977, 979 (C. A. 8) (orders excluded Douglas County including the city of Omaha, Nebraska); *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8), and *Ryan* v. *United States*, 99 F. 2d 864, 870-871 (C.A. 8) (order excluded Jackson County including Kansas City); *Connelly* v. *United States*, 249 F. 2d 576, 583-584 (C. A. 8), certiorari denied, 356 U. S. 921 (order excluded jurors from city and County of St. Louis); *Walker* v. *United States*, 116 F. 2d 458, 462 (C. A. 9) (order excluded jurors from Clark County, Washington); *Frantz* v. *United States*, 62 F. 2d 737, 738-739 (C. A. 6) (order excluded jurors from Bay City, Michigan). And cf. *United States* v. *Skidmore*, 123 F. 2d 604, 607-608 (C. A. 7th), certiorari denied, 315 U.S. 800.

Nor is there any merit to petitioner's contention (Pet. 14) that he was prejudiced by the action of the trial court in keeping the jury together during the course of the trial. The decision to do so was entirely proper and consistent with the initial exclusion from the jury of those residing in Lake and Porter Counties. Having provided for a jury panel that resided outside the area of the unfavorable publicity,

the trial judge did not wish to have his attempt to achieve impartiality nullified by risking exposure of the jury to publicity which was bound to occur during the course of the trial. Indeed, on the first day of the trial, petitioner moved for a three-month continuance as a result of newspaper articles, which appeared shortly before trial, in the "Gary Post Tribune" and the "Hammond Times." (R. 112-113.) For the very purpose of keeping the jury free from such publicity, the trial judge kept them together throughout the trial. In so doing, he instructed the jury to refrain from listening to or watching any news programs on radio and television, or reading any newspapers until the marshal had first deleted therefrom any stories concerning the trial. (R. 115.) It is clear that the trial court's decision to sequester the jury, designed as it was to insulate them from local prejudice, was a sound exercise of its discretion. *Holt* v. *United States*, 218 U. S. 245, 250-251; *Tinkoff* v. *United States*, 86 F. 2d 868, 879 (C. A. 7th), certiorari denied, 301 U. S. 689; *Janko* v. *United States*, 281 F. 2d 156, 170 (C. A. 8th), reversed on other grounds, 366 U. S. 716; *Kleven* v. *United States*, 240 F. 2d 270, 273 (fn. 1) (C. A. 8th), and cases cited therein.

2. Petitioner complains (Pet 14-16) that he was prejudiced by certain incidents which occurred during the trial.

(a) On cross examination, in answer to a question asking what he did with certain records obtained from petitioner, Richard G. Sinclair, a former investigator for the McClellan Committee, stated that he

"used it as a basis to testify before the Labor Rackets Committee in Washington, D. C., in June of 1959." (R. 155.) Since the McClellan Committee was popularly referred to by that name (R. 157), there is no reason to believe that Sinclair's single reference to the "Rackets" Committee represented an attempt to prejudice petitioner before the jury. No further reference to the "Rackets" Committee was made during the trial, and there is no indication that prejudice resulted.

(b) On cross examination, the prosecuting attorney asked petitioner whether, during the prosecution years, he had received "any money in graft payments." (R. 1133.) This question followed a pattern of evidence, previously introduced at the trial, which revealed that petitioner was attempting to conceal the source of his income. This was indicated by petitioner's failure to keep books and records (R. 477, 483, 500) and his inability to recall the names of any clients from whom the bulk of his income allegedly came. (R. 1132-1133.) In addition, it was established that petitioner had carried on his financial transactions largely through the use of currency, totalling $342,919, during the years 1952 through 1957. (Ex. 187.) The receipt and use of such extensive amounts of currency strongly indicated that petitioner was seeking to cover up the source giving rise to these transactions.[3]

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[3] This suspicion was also supported by evidence brought out at an earlier date during the McClellan Committee's hearings, a transcript of which was part of the record in this case. See, *Hearings before the Select Committee on Improper Activities in the Labor or Management Field*, United States Senate, 86th Cong., 1st Sess., Part 53, pp. 18779-18780

In view of this previously related pattern of events, the prosecuting attorney felt that he had a logical basis on which to direct his question concerning the receipt of graft (R. 1134), designed, as it was, to further buttress the Government's position that petitioner's unreported income derived from some "taxable source". *Holland* v. *United States*, 348 U.S. 121, 137; cf. *United States* v. *Ford*, 237 F. 2d 57, 60, 65 (C. A. 2d), certiorari granted, 352 U.S. 1000, certiorari dismissed, 355 U.S. 38. The trial court, however, took the view that the question was improper, instructed the jury to disregard it, and directed that it be given no weight in their consideration of the case. (R. 1135.) It is evident that the immediate corrective action taken by the trial court guarded against any likelihood of prejudice.

(c) Petitioner's remaining complaint (Pet. 15) is apparently directed to the admission of the following evidence: (1) that he failed, in violation of Indiana law, to register with the County Clerk the assumed names of the H & M Realty and H & M Construction Companies (R. 1072-1075), organizations formed by him for the purpose of holding title to certain assets; (2) that the alteration, at his direction, of a certain mortgage was an attempt to evade the tax on this transaction due the State of Indiana (R. 1043); and (3) that he caused a 1957 Lincoln automobile, purchased by him, to be registered in the name of his father-in-law, Reverend Alexander Papp, in order to secure the property tax exemption afforded clergyman. (R. 1078.) The only matter to which petitioner offered objection was item (1) (R. 1073-1074), and

this objection was not well founded, since it is not only clear that the failure to register the assumed names under Indiana law was part of petitioner's pattern of concealment, but it is fundamental that "if the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Spies* v. *United States*, 317 U.S. 492, 499. As to items (2) and (3) above, aside from the fact that no objection was made, it is clear that this evidence was admissible on the issue of intent. *United States* v. *Taylor*, 305 F. 2d 183, 185 (C. A. 4th); *United States* v. *Alker*, 260 F. 2d 135, 157 (C. A. 3d), certiorari denied, 359 U. S. 906.

3. Petitioner contends (Pet. 16-23) that the evidence, as to each element of the offense, was insufficient to support the jury's verdict. The evidence against petitioner is reviewed at length in the thoroughly considered opinion of the Court of Appeals. (Pet. 17a-29a.) That court, viewing the evidence in the light most favorable to the Government, concluded "that there was more than a substantial basis on this record to justify the guilty verdict". (Pet. 17a.) This Court need not further review the unanimous determination of the court below.

4. Petitioner contends (Pet. 23-27) that the trial court erroneously refused to permit him to introduce into evidence his original net worth statement (Deft. Ex. 22), which reflected his theory regarding the return of his principal investment in Barrett Bonds. However, the trial court's action was plainly correct. The repayment of an amount of principal on a bond

owned by a taxpayer has no effect at all upon the taxpayer's net worth. The asset represented by the amount still due on the bond is reduced but the taxpayer's other assets are increased in an equivalent amount by virtue of his receipt of the repayment. There is thus no change in the taxpayer's net worth and the transaction has no effect upon a determination of unreported taxable income by the "net worth" method. Under petitioner's theory the bond asset would be reduced by every repayment of principle but the amounts thus received would not be treated as having increased the amount of other assets for purposes of determining the amount of unreported taxable income. Thus, as noted by the court of appeals (Pet. 23a-24a), the amount of his net worth would be reduced by every repayment of principal and the amount of unreported taxable income would be correspondingly reduced. Since this treatment was plainly erroneous and misleading, the district court correctly refused to permit petitioner to enter his original net worth statement into evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
NORMAN SEPENUK,
Attorneys.

May, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 1046

METRO M. HOLOVACHKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

ROBERT J. DOWNING,
105 S. LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

	PAGE
Argument	2
Conclusion	10
Appendix	1a

CITATIONS

Cases:

Agnew v. U. S., 165 U.S. 36	3
Connelly v. U. S., 8th Cir., 249 F. 2d 576, cert. denied 356 U.S. 921	4
Dunn v. U. S., 5th Cir., 307 F. 2d 883	6
Holt v. U. S., 218 U.S. 245	5
Janko v. U. S., 8th Cir., 281 F. 2d 156, reversed on other grounds, 366 U.S. 716	5
Jarl v. U. S., 8th Cir., 19 F. 2d 891	4
Kleven v. U. S., 8th Cir., 240 F. 2d 270	5
Krulewitch v. U. S., 336 U.S. 440	6
Lewis v. U. S., 279 U.S. 63	3
Myers v. U. S., 8th Cir., 15 F. 2d 977	4
Rothenberg v. U. S., 245 U.S. 480	3
Ryan v. U. S., 8th Cir., 99 F. 2d 864	4
David H. Schultz, 30 T.C. 256	9
Spencer v. U. S., 8th Cir., 169 Fed. 562	4
Spies v. U. S., 317 U.S. 492	7
Stroud v. U. S., 251 U.S. 15	3
Tinkoff v. U. S., 7th Cir., 86 F. 2d 868	5
U. S. v. Alker, 3rd Cir., 260 F. 2d 135	7

U. S. v. Skidmore, 7th Cir., 123 F. 2d 604, cert. denied 315 U.S. 800 4
U. S. v. Taylor, 4th Cir., 305 F. 2d 183 7
Walker v. U. S., 8th Cir., 93 F. 2d 383 4
Walker v. U. S., 9th Cir., 116 F. 2d 458 4

Other:

Federal Rules of Criminal Procedure
Rule 18 2
Rule 19 2
Rule 21(a) 2
Rule 52(b) 7
Sixth Amendment, Constitution of the United States 2

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Respondent.

PETITIONER'S REPLY BRIEF.

Preliminary.

In the interests of justice, the government's brief requires a reply.

ARGUMENT.

1. The government (p. 5), in the first sentence thereof, states petitioner complained that, in view of unfavorable newspaper publicity, he could not obtain an impartial jury from the Gary and Hammond areas.

This is an inaccurate interpretation of the record. The petitioner never suggested that an impartial jury could not be drawn from the Gary-Hammond area.

To conclusively clear any confusion as to the true facts, the petitioner respectfully represents to this court that the following simple statement of fact is uncontestable: (1) The petitioner did not request, but objected to, the court's dismissal of the petit jury drawn January 2, 1962, and made up of residents from Lake and Porter Counties; (2) the petitioner did not request, but objected to, a change of venue; (3) the petitioner demanded, as a right, to be tried by jurors from Lake and Porter Counties; and (4) the petitioner consistently objected to being tried by jurors from outside Lake and Porter Counties. (See App. 36-38, Motion of Defendant Objecting to Dismissal of Petit Jury Drawn January 2, 1962, and to Quash and Dismiss Entire Panel, Venire and Petit Jury Drawn January 17, 1962.)

Petitioner, in the petition for writ of certiorari, has insisted that the importing of jurors from without Lake and Porter Counties amounted to a compulsory change of venue in violation of the *6th Amendment* and the rights of a defendant under *Rules 18, 19 and 21(a)* of the *Federal Rules of Criminal Procedure* (Pet. 9).

The government, in its brief in opposition, chose not to favor this court with a reply to these contentions. Alterna-

tively, it has elected to ignore the fact that Lake and Porter Counties are, by rule of court, in and of themselves, a separate division of the Northern District of Indiana. Vaulting from this faulty premise, it proceeds to argue that the exclusion of any particular area in the district is within the sound discretion of the trial judge. Even as to this secondary position, the petitioner vehemently disagrees and respectfully represents to this court that the position of the government cannot be supported.

The government cites, as authority, four cases decided by this Court. (Gov. 5 and 6). An examination of these cases will indicate that their holdings are not consistent with the contentions of the government. In *Lewis* v. *U. S.*, 279 U.S. 63, jurors from ten counties were excluded because those counties were no longer within the district. In *Stroud* v. *United States*, 251 U.S. 15, the County of Leavenworth was excluded on claim of local prejudice; however, the government has failed to mention that this exclusion was at the request of the defendant. The defendant in that case complained to the court that he could not receive a fair trial from residents of that county. The petitioner, in the instant case never so complained; on the contrary, he always insisted that he could not receive a fair trial if Lake and Porter County residents were excluded. Any representation of the government which indicates that the position of the petitioner was otherwise than here expressed is inaccurate and misleading.

The jurors in *Rathenberg* v. *U. S.*, 245 U.S. 480; and *Agnew* v. *U. S.*, 165 U.S. 36, were selected from throughout the respective divisions and those cases are unrelated to the issues here presented.

The government also lists (p. 6) a number of courts of appeals decisions with short summaries of fact and

suggest that those cases are "closely analogous" to the facts of the instant case. A reproduction of these citations with a clarification of their facts (italicized) serves to illuminate the issue here presented and draws into question any analogies between those cases and the case at bar. *Spencer* v. *U. S.*, 8th Cir., 169 Fed. 562 (order—*entered pursuant to a rule of court applicable to all cases in all divisions of the District which provided that no citizen should be drawn from a county in which court would be held*—excluded jurors from Polk County, Iowa, including the City of Des Moines); *Jarl* v. *U. S.*, 8th Cir., 19 F. 2d 891, and *Myers* v. *U. S.*, 8th Cir., 15 F. 2d 977 (Order—*entered pursuant to a long-standing practice of court, applicable to all cases, which excludes residents in the county where the offense was committed*—excluded Douglas County, including the city of Omaha, Nebraska); *Walker* v. *U. S.*, 8th Cir., 93 F. 2d 383 and *Ryan* v. *U. S.*, 8th Cir., 99 F. 2d 864 (*relying on the authority of Jarl and Myers above*, upheld orders excluding Jackson County, including Kansas City); *Connelly* v. *U. S.*, 8th Cir., 249 F. 2d 576 (cert. denied, 356 U.S. 921) (Order excluded jurors from city and county of St. Louis—*entered after defendant had requested a change of venue*); *Walker* v. *United States*, 9th Cir., 116 F. 2d 458 (*relying on Jarl* v. *U. S. supra—and where there was no claim of abuse of discretion*—order excluded jurors from Bay City, Michigan, *and where the court noted that the jurors represented all counties in the division excepting one*). Also, *U. S.* v. *Skidmore*, 7th Cir., 123 F. 2d 604, cert. denied, 315 U.S. 800 (*where there was not one scintilla of evidence to support the charge that the grand jury or petit jury was illegally drawn*). There is no rule of court on this point in the Northern District of Indiana, but the practice prior to the instant case was to the contrary of the decisions cited by the government.

The petitioner respectfully submits that these cases are no authority for the position of the government. Of the eight court of appeal cases permitting the exclusion of jurors, six are from a single circuit, the 8th. In the lead cases, as noted above, the exclusion order was a result of a long-standing practice or rule of court in the respective districts thereby applicable to all cases and all defendants. *They are not authority to support a sua sponte exclusion order of a trial judge.* And, as noted above, those cases which were not pursuant to a rule or settled practice of court *rely* on precedent set in cases where such a rule was present and a reading of these cases evidences no attempt by the appellants in said cases to draw the distinction. Furthermore, *in no case* has a defendant's entire division been excluded without his consent, or in the absence of a local rule of court.

In support of the trial judge's unusual conduct in sequestering the jury on his own motion, and without preadvising counsel, the government cites (p. 7) the Supreme Court case of *Holt* v. *U. S.*, 218 U.S. 245, and three court of appeal cases, *Tinkoff* v. *U. S.*, 7th Cir., 86 F. 2d 868; *Janko* v. *U. S.*, 8th Cir., 281 F. 2d 156, reversed on other grounds, 366 U.S. 716, and *Klaven* v. *U. S.*, 8th Cir., 240 F. 2d 270. These cases taken together hold that the existence of prejudice *cannot be assumed* and that even over the insistence and objections of the defendant, a trial judge may properly permit the jury to separate, and that frequent admonishments by the trial judge were sufficient to preserve the impartiality of jurors despite prejudicial articles in local newspapers. *By contrast*, the government cites these cases as authority for the proposition that the trial judge, in the exercise of his discretion, *may assume* the existence of prejudice and, over the objection of the defendant, order the jury sequestered.

The government's brief on the jury question is inaccurate as to the record and authority; it is evasive in that it avoids the issues of compulsory change of venue, allowing grand jurors from Lake and Porter Counties, the fact the petit jurors were not truly representative of petitioner's community and the dangerous precedent now established by the opinion below.

2. The government would have this court believe that when the prosecutor accused the petitioner of receiving *graft*, he was acting properly or, if he had acted improperly, the accusation was hardly more than an innocent and innocuous incident which was immediately corrected when the trial court instructed the jury to disregard it.

The government now asserts that, in any event, petitioner was in no way prejudiced by the accusation. Yet the sole purpose of the accusation was to inflame and prejudice the minds of the jurors. The government admits it had no evidence to support the accusation of graft, and further admits that it had no source to show where the net worth increases came from. Under the circumstances, the inescapable conclusion is that the reference of the prosecutor to "graft" was a *knowing, willful and deliberate attempt* to smear the petitioner and to prejudice the jury.

As the late Justice Jackson said in *Krulewitch* v. *U. S.*, 336 U.S. 440, at 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." Again, as was stated in *Dunn* v. *U. S.*, 5th Cir., 307 F. 2d 883: "* * * if you throw a skunk into the jury box, you can't instruct the jury not to smell it."

Petitioner was indicted and tried for income tax evasion, not for his appearance before the McClellan Committee. The government has consistently projected the jury and the courts with references to said committee hearings.

This fact is illustrated by the government's reference on p. 8 of its brief (footnote) to matters outside the record of the instant case to support its position.

The government's concession (pp. 8-9), that the graft question was asked petitioner to establish "source" must obviously be viewed as the only motivating factor for the testimony of the witness Sinclair. In this fashion the government forged the link between "Rackets"—"McClellan Committee" and "Graft." The conclusion is inescapable. The purpose was to inflict upon the petitioner the type of prejudice from which the petitioner could not recover. This effectively prevented petitioner from obtaining a fair and impartial trial as guaranteed by the Constitution.

In connection with the government's explanation (p. 9, par. (c)) of offering evidence of the alleged violations of Indiana law[1], the government claims its purpose was to establish intent. The fact is the record not only is barren of any evidence to directly or indirectly establish a tax-evasion motive as to these items, but witness (Special Agent) Boyll admitted he did not know of any unreported income by the H & M Companies (App. 777). Thus *Spies* v. *U. S.*, 317 U.S., 492, 499 cannot support the government. The cases of *U. S.* v. *Taylor*, 4th Cir., 305 F. 2d 183, 185, and *U. S.* v. *Alker*, 3rd Cir., 260 F. 2d 135, involved kindred acts to those charged in their respective indictments and as such are distinguishable from cases in which the prejudicial acts complained about have no remarkable conform-

[1] Petitioner, in his Motion for Acquittal (App. 54-59), objected to all alleged violations of certain laws of the State of Indiana. *Rule 52(b) Federal Rules of Criminal Procedure*, states plain errors or defects affecting substantial rights may be noticed although not brought to the attention of the court.

ity to those charged in the indictment (as in the instant case).

Recognizing the length of this brief, the petitioner has not noted various mis-statements as to certain items of evidence referred to on pages 8 (par. (b)) and 9 (par. (c)).

3. On page 10 (No. 3) the government assures this Court the evidence was sufficient to support the conviction. Thus by mis-stating the issues raised by petitioner in his brief (pp. 16-23), the government avoids illustrating to this Court how its method of proof and evidence failed to meet the recognized standards for prosecutions in this type of income tax case.

The government's failure to specifically discuss the issues raised by the petitioner can neither be justified by the aforesaid amazing disregard of the cited facts and law nor by the unanimous opinion of the court below.

The errors complained of are brought into sharp focus, on just one of the many points, by the government's admission to this court that its prejudicial "graft" question (Gov. 9) was based on the prosecution's desperate effort to meet the standards for "current taxable income" and "likely source."

It is respectfully represented to this Court that a complete review of the entire record as will follow by the granting of this petition will justifiably illustrate the truth of petitioner's position and the amazing disregard of said record by the court below.

4. The government failed to cite any authoritative source to support the trial court's failure to permit the petitioner to present his theory of the Barrett Bond issue on his summary. The government also failed to illustrate why petitioner's authorities (Pet. 25-27) are not applicable.

The government conceded (Gov. 11, lines 2-5) that petitioner's other assets are increased in an equivalent amount by virtue of the Barrett Bond repayment. It is undisputed that the amounts received as principal repayment are tax-free in the year received. Therefore, the government concedes that the "taxpayer's other assets are increased by virtue of * * *" tax-free funds. By increasing the other assets, there is an increase or so-called "bulge" in the end result. As the increase or so-called "bulge" was caused by amounts which included tax-free funds, the amount of said tax-free funds must be subtracted in order to ascertain the current taxable net income. See *David H. Schaltz*, 30 TC 256 at 275 and Pet. 24-25.

In an effort to illustrate the technique or formula used in an attempt to reconstruct current taxable income, included herein as Exhibit "A" (p. 1a) is a simple *hypothetical* sample. This also illustrates petitioner's method for substracting the disputed tax-free principal received by petitioner in each taxable year. Line 17 of said Exhibit "A" is a vital figure. As applied to Exhibit "A" under the government's theory, "current taxable income" includes (per government's admission p. 11) $250.00 increased by virtue of his receipt of a tax-free repayment. Therefore, petitioner is convicted because of tax-free funds. The petitioner's theory eliminates the $250.00; therefore, the "bulge", if any, (Line 19) is not caused by tax-free funds.

It is submitted that denying the petitioner the right to present this theory as advocated by petitioner's expert witness Stroh (who had many years of Internal Revenue experience (App. 1189-91) along with the governmental and other experience of petitioner's counsel) (see Petition for Rehearing, p. 16, n. 6(1)) was a denial of petitioner's constitutional right to a fair and impartial trial.

CONCLUSION.

The government's brief clearly illustrates how petitioner's constitutional rights were violated. It is obvious that the government really cannot seriously and authoritatively defend the opinion below. It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. DOWNING,
105 S. LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

APPENDIX.

HYPOTHETICAL SUMMARY
SO CALLED NET WORTH-EXPENDITURE TECHNIQUE
RE: TAX-FREE RETURN OF PRINCIPAL

Line	Item	(A) 12 31 54	(B) Per Petitioner 12 31 55	(C) Per Government 12 31 55
1	Total Assets	1000.00(a)	2500.00(b)	2500.00(b)
	(Less)			
2	Total Liabilities	100.00	150.00	150.00
	(Equal)			
3	Net Worth (Line 3(B) or 3(C) minus 3(A) equal)	900.00	2350.00	2350.00
			less-900.00	less-900.00
4	Increase in Net Worth		1450.00	1450.00
	Adjustments To Compute Tax Liability			
5	*Add*: Non-Deductible Expenditures		200.00	200.00
6	*Deduct*:			
7	Non-Taxable Interest		10.00	10.00
8	*Non-Taxable Return of Principal*		250.00(c)	XX
9	Capital Gains Adjustments		5.00	5.00
10	Loans		10.00	10.00
11	Gifts		20.00	20.00
12	Tax Refunds		5.00	5.00
	(Equal)			
13	Corrected Adjusted Gross Income		1350.00	1600.00
14	Deduct:			
15	Itemized Tax-Return Deductions		40.00	40.00
16	Exemptions		600.00	600.00

Starting Point. Lines 4-16 not filled in for starting point.

Line	Item	(A) 12 31 54	(B) Per Petitioner 12 31 55	(C) Per Government 12 31 55
1	Total Assets	1000.00(a)	2500.00(b)	2500.00(b)
	(Less)			
2	Total Liabilities	100.00	150.00	150.00
	(Equal)			
3	Net Worth	900.00	2350.00	2350.00
	(Line 3(B) or 3(C) minus 3(A) equal)		less 900.00	less 900.00
4	Increase in Net Worth		1450.00	1450.00
	Adjustments To Compute Tax Liability			
5	*Add:* Non-Deductible Expenditures		200.00	200.00
6	*Deduct:*			
7	Non-Taxable Interest		10.00	10.00
8	*Non-Taxable Return of Principal*		250.00(c)	xx
9	Capital Gains Adjustments		5.00	5.00
10	Loans		10.00	10.00
11	Gifts		20.00	20.00
12	Tax Refunds		5.00	5.00
	(Equal)			
13	Corrected Adjusted Gross Income		1350.00	1600.00
14	Deduct:			
15	Itemized Tax-Return Deductions		40.00	40.00
16	Exemptions		600.00	600.00
	(Equal)			
17	*Current Taxable Income*		710.00	960.00
	(Less)			
18	Taxable Income Reported		710.00	710.00
19	Unreported Taxable Income (Bulge)		-0-	250.00

Lines 4 to 19 not filled in for starting point.

Starting Point

(a) This includes "Barrett Bonds" in the amount of $450, "Other Assets" of $550.

(b) This includes Barrett Bonds in the amount of $200 and "Other Assets" of $2300.

N. B. Barrett Bonds are reduced by $250 which is repaid to taxpayer and is reinvested in "Other Assets". Thus there is no reduction in Total Assets.

(c) $250 Barrett Bond non-taxable funds received in 1955 and invested in "Other Assets" included in total of line 1.

SUPREME COURT, U. S.
FILED
JUN 13 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 1046

METRO M. HOLOVACHKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ROBERT J. DOWNING,
105 S. LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

Midwest Law Printing Co., 226 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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Petitioner prays that this Court grant rehearing of its order of June 10, 1963, denying the Petition for Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled cause as prayed for in the petition filed April 24, 1963.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1) The Advisory Committee on Criminal Rules has recommended amendments to *Rules 18, 19 and 21* of the *Federal Rules of Criminal Procedure*. These rules, if accepted by the Committee on Rules of Practice and Procedure, will be presented to this Court for their consideration and adoption in the near future. These amendments expressly eliminate division venue and also provide that a trial court may select a new location for trial. These are the precise issues presented in the instant case. It is urged that the granting of a writ of certiorari will provide the petitioner with an opportunity to present to this Court an extensive and thorough argument in opposition to the proposed amendments which we believe will be beneficial to this Court in its eventual consideration of the proposed amendments.

2) This petition is brought because it is sincerely felt that the Court's denial of Certiorari has, in effect, approved the practice of refusing defendant in a criminal case the right to trial by jury drawn from his own county (or division) against his vigorous objection. This practice, which we believe to be contrary to the established law of the land and in violation of basic Constitutional rights, will lead to similar practices in state courts. Surely this Court would not tolerate such injustice.

We realize our reply brief was on file in this Court only two days, and in the pressure of the large volume of business in this Court, the all-important jury question may not have been given sufficient consideration.

Questions of much less importance in other cases have been reviewed to preserve the rights of defendant. We urge the principle involved here necessitates a review.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROBERT J. DOWNING,
105 S. LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

/s/ ROBERT J. DOWNING

Attorney for Petitioner.